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February 19, 2002 OF THE
EXECUTIVE SECRETARY

David Waddell
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243

Re: Show Cause Proceeding Against TalkCom, Inc.

Docket No: 01-00216

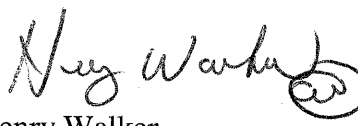
Dear David:

Enclosed please find the original and thirteen copies of an Initial Response of Talk.Com and Motion to Dismiss.

Very truly yours,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By:


Henry Walker

HW/CW

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

IN RE:

**SHOW CAUSE PROCEEDING
AGAINST TALK.COM, INC.**

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**DOCKET NO.
01-00216**

INITIAL RESPONSE OF TALK.COM

Filed February 19, 2002

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BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:

SHOW CAUSE PROCEEDING
AGAINST TALK.COM, INC.

DOCKET NO. 01-00216

INITIAL RESPONSE OF TALK.COM¹

Respondent Talk.com Holding Corp. d/b/a Talk.com ("Talk.com" or the "Company"), by its attorneys, hereby provides this Initial Response ("Response") to the Order Requiring Talk.com to Appear and Show Cause why a Cease and Desist Order and/or Fine Should Not be Imposed issued by the Tennessee Regulatory Authority (the "TRA" or "Authority") on November 8, 2001 (hereinafter referred to as the "Show Cause Order").

This Response is divided into two parts. First, in the body of this document, Talk.com addresses the legal standards applicable to the Slamming, Cramming and "Do Not Call" Counts alleged in the Show Cause Order. This portion of the Response also addresses facts or

¹ The Show Cause Order incorrectly identifies Talk.com Inc. as the respondent in this docket. Talk.com Inc. (now known as Talk America Holdings Inc.) is a holding company and is not a telecommunications carrier in Tennessee. Service in Tennessee is provided by Talk America Inc. f/k/a Talk.com Holding Corp. On April 9, 2001, Talk.com Holding Corp. changed its name to Talk America Inc. On May 7, 2001, Talk.com filed a request for name change to the TRA. On June 12, 2001, the Directors voted to defer a ruling on Talk.com's request to change its name and the TRA issued an order deferring such on October 12, 2001. *See Order Deferring a Ruling on Talk.com Holding Corp's Notice of Name Change* Docket No. 01-00410. Outside of Tennessee, Talk.com does business under the name "Talk America" in all states except Indiana (local service request pending; long distance name change approved) and Texas (name change awaiting final approval).

arguments common to many of the individual complaints alleged, as well as arguments relating to the CSD's calculation of a proposed penalty for the alleged violations. Second, attached as **Exhibit A, Tabs 1-34**² are summaries of Talk.com's factual and legal position with respect to each of the individual complaints set forth in the Show Cause Order.³ For the Authority's convenience, these summaries are numbered in the same order as the complaints are discussed in the Show Cause Order.⁴ The summaries also contain additional factual information relevant to the review of the complaints set forth in the Show Cause Order.

Concurrent with this Response, Talk.com is filing a separate Motion to Dismiss certain Counts in this Show Cause proceeding. Specifically, Talk.com moves to dismiss these cramming allegations relating to bundled service packages (Counts 65-76 and 79-93) on the grounds that these allegations relate to interstate services and activities that are beyond the TRA's jurisdiction. In addition, Talk.com moves to dismiss Count 31 and Count 32, involving the complaint of Joe and Rose Matthews, on the grounds that the Authority's pursuit of these Counts are barred by an earlier settlement between the Authority and Access One Communications.⁵

Finally, Talk.com notes that discovery in this docket is still in the initial phases. In particular, Talk.com has requested additional discovery in the form of depositions, which request

² Citations to the Company's Exhibits to this Response are **Exhibit A-#**. For reference to exhibits attached to the Show Cause Order, the Company will use **Exhibit #**.

³ See also *Affidavit of Jennifer Holcombe Thistle* attached hereto as **Exhibit B** and *Affidavit of Francie McComb*, attached hereto as **Exhibit C**.

⁴ For example, in the Show Cause Order Joe and Rose Matthews d/b/a Matthews Towing and Car Care Center are slamming exhibit **Tab 16**, the Company's summary of their complaint and supporting documents can be found in **Tab A-16**.

⁵ Settlement Agreement between Access One Communications and the Consumer Services Division of the Tennessee Regulatory Authority ("Settlement Agreement") dated July 28, 2000 and approved by the Tennessee Regulatory Authority on September 18, 2000 in Docket No. 00-00687.

remains pending. Periodically throughout, Talk.com notes where such depositions might assist in the evaluation of the issues in this docket.⁶ Further, additional data requests will likely be necessary after the filing of this Response, as noted by Pre-Hearing Officer Hotvedt during the February 7, 2002 status conference. Accordingly, Talk.com provides this Response based upon the information it has gathered to date, and respectfully requests the right to supplement this Response as may be appropriate prior to the hearing on the Show Cause allegations.

I. SUMMARY OF ARGUMENT

The Show Cause proceeding against Talk.com should be dismissed. Talk.com is an experienced provider of integrated telecommunications services, with a 12-year history of providing long distance and, more recently, local telecommunications services. Talk.com has developed attractive packages of local and long distance services which it markets almost exclusively to residential subscribers in Tennessee and elsewhere. Talk.com's products provide the first real competitive choices for residential customers of BellSouth and other incumbent local exchange carriers in Tennessee. As the Company will demonstrate, the Company has not engaged in a pattern or practice of slamming, cramming or unlawful solicitations in Tennessee. The incidents set out in the Show Cause Order are not the result of any intentional actions to defraud or mislead customers in Tennessee, as the CSD has asserted. Instead, each of the incidents resulted from good faith activities which, even where such actions were mistaken, did not violate any applicable legal standards. Moreover, Talk.com has spent millions of dollars and countless man-hours since entering the local market working to improve its processes and to minimize errors like those alleged in this docket.

⁶ Talk.com will file its final submission in support of such depositions on February 21, 2002, as set forth in the Procedural Schedule in this docket.

Slamming Allegations

The first category of complaints in the Show Cause Order relates to alleged violations of Tenn. Code Ann. § 65-4-125(a) and the associated TRA rules and regulations prohibiting unauthorized changes in a customer's preferred providers of telecommunications services ("slamming"). Specifically, the Show Cause Order details fifteen (15) incidents involving authorization to switch telecommunications service providers through the use of promotional checks. For each of the 15 incidents included in this section, the Show Cause Order asserts that (1) the Company slammed these individuals, in violation of Tenn. Code Ann. § 65-4-125(a) and (2) the Company violated Tenn. Comp. R. & Reg. 1220-4-2-.56 governing the content of letters of agency ("LOAs") included on the promotional checks. As shown in Section IV, for each of these incidents, the Company will demonstrate that it did not slam the individuals because it had actual or apparent authority, in the form of a signed promotional check, to switch the telecommunications service provider. Further, as shown in Section IV.B, the Company will also demonstrate that the LOA used on the promotional check was in compliance with the Tennessee rules.

Second, the Show Cause Order details fifteen (15) incidents involving the use of telemarketing. The Show Cause Order alleges that (1) the Company slammed these individuals, in violation of Tenn. Code Ann. § 65-4-125(a) and (2) the Company violated Tenn. Comp. R. & Reg. 1220-4-2-.56 governing the content and requirements of solicitation and verification scripts. In Section V of this Response, the Company will demonstrate that it had authorization to change the telecommunications service provider from these individuals and therefore, did not engage in slamming with respect to any of these switches. In addition, as shown in Section V.B, the

Company substantially complied with the rules governing the solicitation and verification of a switch in telecommunications service providers.

Third, the Show Cause details four (4) incidents characterized as “miscellaneous” infractions of both the Tenn. Code Ann. § 65-4-125(a) and the Tenn. Comp. R. & Reg. 1220-4-2-.56. As shown in Section VI, the Company will demonstrate that it did not violate the Tennessee laws and regulations cited in the Show Cause Order and therefore, did not slam the individuals identified in this section.

“Do Not Call” Allegations

The final category of complaints relates to alleged violations of Tenn. Code Ann. § 65-4-404 and the associated TRA rules and regulations relating to the “Do Not Call” Register in Tennessee. The Show Cause Order asserts fifty-six (56) incidents of alleged calls in violation of the Tennessee Do Not Call rules. As shown in Section VII, the Company Talk.com had the legal right to contact certain of these individuals, either because their enrollment on the Register was not effective, because the effectively enrolled number had not posted on the Register for the requisite period, or because the telephone numbers allegedly called were business numbers ineligible for inclusion on the Do Not Call list. Talk.com also will show that it did not knowingly contact or cause to be contacted of the individuals in twenty-two (22) of the alleged incidents. Furthermore, Talk.com will show that it took reasonable actions to implement a Do Not Call list, based on nationally available information, and to develop and enforce internal policies to avoid making solicitations to individuals that do not wish to receive telemarketing calls, and that it promptly corrected its oversight in failing to integrate Tennessee’s new requirements. As such, Talk.com exercised due care and took reasonable precautions to prevent

the kinds of incidents alleged in the Show Cause Order, which precludes a finding a liability pursuant to Tenn. Code Ann. § 65-4-404.

“Cramming” Allegations

The final general category of complaints relates to alleged violations of Tenn. Code Ann. § 65-4-125(b) and the associated TRA rules and regulations prohibiting the knowingly improper billing of services to customers in Tennessee (“cramming”). The Show Cause Order details twenty-nine (29) incidents in which the CSD alleges that the Company crammed the individuals, in violation of Tenn. Code Ann. § 65-4-125(b) by attempting to bill and collect for telecommunications services it knew, or reasonably should have known, the customer did not request. Concurrent with this Response, the Company is filing a Motion to Dismiss twenty-seven (27) of these allegations. For the two (2) remaining individuals, the Show Cause Order alleges that the Company crammed these individuals in violation of Tenn. Code Ann. § 65-4-125(b) and Tenn. Comp. R. & Reg. 1220-4-2-.58. In Section VIII of this Response, the Company will demonstrate that it had authority to bill and collect for services to these individuals. The Company, therefore, does not provide a detailed response to the allegations contained therein except for the two (2) individuals mentioned. However, in the event its Motion to Dismiss is not granted, the Company requests that it be given a reasonable time to provide responses to the specific allegations raised in the Show Cause Order.

Calculation of the Proposed Penalty

Finally, if the TRA nonetheless, finds any violations of the above-mentioned Tennessee Rules, the calculation and amount of the proposed penalty should be reduced substantially. First, the CSD’s maximum calculation erroneously inflates the number of days of the alleged violations. In particular, the CSD unlawfully seeks to treat the single act of “designat[ing] or

chang[ing]" a subscriber's carrier into multiple acts spanning hundreds of days in some instances. Moreover, the CSD miscalculates the number of days of service in any event and seeks to hold Talk.com responsible for delays by the subscriber, its carrier of choice and/or its local exchange carrier in implementing the subscriber's desire to change carriers.

Second, the assessment of a maximum fine of \$1000 per slamming or cramming violation is not appropriate in this case considering the efforts undertaken by Talk.com to ensure compliance with the FCC's and the Authority's verification rules and procedures, as described herein, and the nature and circumstances of the customer complaints involved. Similarly, the imposition of a maximum fine of \$2000 per "Do Not Call" violation also is inappropriate in light of Talk.com's reasonable efforts to comply with the purpose and intent of the Tennessee rule. Accordingly, even if some violations of law are found, the proposed penalty should be reduced substantially, as required by Tenn. Code Ann. § 65-4-125(f) for (slamming and cramming) if not eliminated in its entirety based on both the Company's good faith efforts.

II. BACKGROUND OF COMPANY

A. HISTORY OF COMPANY

Talk.com is an integrated communications provider offering local, long distance and dial-up Internet telecommunications services to residential and small business customers across the United States, included Tennessee. Talk.com created this distinctive offering after 10 years as a long distance provider, serving over a million customers nationwide. The Company delivers value in the form of savings, simplicity and quality service based on the efficiency of its low-cost, nationwide network and the effectiveness of its systems that interface electronically with the Bell Operating Companies.

Originally founded in 1989 as Tel-Save, Inc. ("Tel-Save"), Talk.com entered the telecommunications business as a reseller of long distance services in Pennsylvania. Shortly thereafter, Talk.com entered into an exclusive agreement with AT&T, allowing the Company to purchase the network services necessary to enable it to expand its service offerings to customers nationwide and to resell AT&T's Software Defined Network ("SDN") to business and residential customers who otherwise were unable by themselves to obtain the lower prices available to Talk.com through its volume commitments. This agreement with AT&T is believed to be the first carrier-to-carrier relationship in the history of the telecommunications industry in which AT&T allowed a non-facilities-based carrier to resell AT&T's facilities under the reseller's name.

On September 21, 1995, Talk.com (then Tel-Save) consummated an initial public offering that resulted in its parent, Tel-Save Holdings, Inc. becoming a publicly traded company on the NASDAQ under the call letters of TALK. The substantial additional financing generated by this public offering enabled Talk.com to become a facilities-based interexchange carrier ("IXC") and to invest millions of dollars to develop its One Better Network ("OBN"), which features five (5) Company-owned Lucent 5ESS-2000 switches connected with AT&T digital transmission facilities.

In 1997, Talk.com became one of the first interexchange carriers to utilize the capabilities of the Internet to simplify the ordering and billing of telecommunications services. Talk.com pioneered the concept of an "electronic LOA," a form of authorization Congress explicitly

endorsed in the E-Sign Act⁷ and that the FCC described as “a quick and efficient means of signing up new subscribers [that] should be made widely available to carriers and consumers.”⁸

Through an exclusive joint marketing agreement with America Online (“AOL”), the Company introduced this “first of its kind” online “paper-less” sign-up program for long distance services provided to residential customers. The Company’s service offerings allowed subscribers to receive attractive per minute rates and low cost, monthly service plans along with innovative billing and payment solutions. AOL customers selecting Talk.com as their service provider were able to view their call detail and telephone billing information through the Internet practically in real time – that is, within minutes of placing each call. Such “real time” monitoring assists customers in keeping track of their monthly telephone bills and of the individuals making calls from their billing telephone numbers (“BTNs”), thereby helping customers to manage their telecommunications expenses. In addition, the plans combined convenient “paper-less” billing with automatic payment through the customer’s preferred payment method, frequently the same credit card the customer used to pay its AOL service fees.

The arrangement with AOL ended in November 2001. The Company now offers similar services to any customer signing up for its services on-line.

On May 21, 1999, reflecting the success of its Internet-based products, the Company formally changed its name to Talk.com Holding Corp. As of December 2001, Talk.com offered long distance services to over 13,000 long distance customers and over 8,000 local customers in Tennessee, the vast majority of which are residential customers.

⁷ Electronic Signatures in Global and National Commerce Act, Pub. L. No. 106-229 (2000).

⁸ Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, Third Report and Order and Second Order on Reconsideration, 15 FCC Rcd 15996, ¶ 11 (2000).

In early 2000, Talk.com determined that its long distance residential customer base was interested in also purchasing local exchange services from the Company, as a means of one-stop, bundled telecommunications shopping at low prices. With that in mind, the Company undertook to enter the local exchange market using the unbundled network element platform ("UNE-P"), a competitive entry vehicle made possible by the federal Telecommunications Act of 1996. In August 2000, Talk.com completed a merger with Access One Communications, Inc. ("Access One"), an entity with successful experience offering local exchange services. Access One was one of the first competitive local exchange providers to forge a UNE-P relationship with BellSouth, and had over three years of experience providing UNE-P based local exchange services in those states historically served by BellSouth, including Tennessee.

This merger has enabled the Company to expand its innovative service offerings once again, this time to provide a variety of bundled local and long distance packages to its primarily residential subscribers at competitive, low rates. Recently, for example, the Company introduced a new service plan to customers throughout the country. Recently, the Company introduced an additional service plan that includes up to 1000 minutes of free long distance calling to other Talk.com local customers, free local and intraLATA calling to non-Talk.com customers, state-to-state and interLATA long distance calls for \$0.069/minute, and custom calling features – all for a low, flat fee of \$44.95. Through innovative, low cost calling plans such as these, residential customers in Tennessee benefit from a choice among plans best suited to their individualized calling needs.

All of Talk.com's features are accessible on one simple, integrated bill, which can be easily paid at www.talk.com via secure credit card processing, eliminating the need for monthly

paper bills, stamps, envelopes and checks. Talk.com brings it all together to offer consumers a complete communications package.

B. THE COMPANY AND TENNESSEE

Talk.com is certificated to operate as a telecommunications service provider in the State of Tennessee.⁹ Over the last seven (7) years, Talk.com has operated in Tennessee as Tel-Save Inc. d/b/a Network Services of New Hope and d/b/a The Phone Company. On September 14, 1999, the name was changed to Talk.com Holding Corp. d/b/a Network Services of New Hope and d/b/a The Phone Company. *See* Case No. 99-00610. As of December 2001 over 800,000 residential and business customers in Tennessee.

Talk.com offers a wide variety of telecommunications services to customers in Tennessee, including local, local toll and long distance telephone service. Though Talk.com principally offers its service through direct sales agents. Historically, Talk.com has marketed using outbound methods such as telephone solicitation and promotional checks and inbound, through its marketing arrangement with AOL. Talk.com has also enjoyed the benefits of joint marketing programs such as the joint marketing with AOL directly to AOL members. While Talk.com does have business customers, its emphasis in Tennessee has always been providing quality service to residential customers.

III. STANDARD OF PROOF

The Show Cause Order asserts three (3) types of alleged slamming violations. First, fifteen (15) allege violations resulting from the use of promotional checks to authorize the switch of telecommunication service providers. Second, another fifteen (15) allege violations resulting from the use of telephone solicitations to authorize and verify the switch of telecommunications

⁹ Tel-Save Inc. obtained toll Case No. 95-02758, Access One was granted resale authority (local and toll) in Tennessee on November 3, 1998, Case No. 98-00351.

service providers. Finally, four (4) involve miscellaneous incidents alleged to constitute slamming. In addition, two (2) cramming complaints are also included in this response.

A. IN ORDER TO BE FOUND TO HAVE ENGAGED IN SLAMMING OR CRAMMING, TALK.COM MUST HAVE KNOWN, OR REASONABLY SHOULD HAVE KNOWN THAT IT WAS ACTING WITHOUT THE SUBSCRIBER'S AUTHORIZATION

The applicable legal standard for the slamming violations is set forth in Tenn. Code Ann. § 65-4-125(a). Specifically, the Tennessee Code states that:

[n]o telecommunication service provider, and no person acting on behalf of any telecommunications service provider, shall designate or change the provider of telecommunications service to a subscriber if the provider or person acting on behalf of the provider *knows or reasonably should know* that such provider or person does not have the authorization of such subscriber.

Tenn. Code Ann. § 65-4-125(a) (*emphasis supplied*). This state statute set out under the Tennessee Code, unlike the corresponding federal regulations, *see* 47 C.F.R. 64.1130 *et seq.*, requires that the carrier or the person acting on its behalf, *know or reasonably should know* that they do not have the authorization of the subscriber.

Similarly, the applicable legal standard for the cramming violations is set forth in Tenn. Code Ann. § 65-4-125(b). Specifically, the Tennessee Code states that:

[n]o telecommunications service provider, and no person acting on behalf of any telecommunications service provider, shall bill and collect from any subscriber to telecommunications services charges for services to which the provider or person acting on behalf of the provider *knows or reasonably should know* such subscriber has not subscribed or any amount in excess of that specified in the tariff or contract governing the charges for such services

Tenn. Code Ann. § 65-4-125(b) (*emphasis supplied*). This statute requires that the carrier or the person acting on its behalf know or reasonably should know that they do not have authority to bill and collect for services from the customer.

The plain language of the Tennessee Code makes it clear that the mere fact that an unauthorized switch occurred or the carrier billed and collected from the subscriber is insufficient to prove a violation. “Slamming” and “cramming” are not strict liability offenses under Tenn. Code Ann. § 65-4-125(a) and (b). Rather, the Code makes an unauthorized switch or an incorrect bill a violation only if the provider also “knows or reasonably should know” that the subscriber has not provided authorization. Tenn. Code Ann., § 65-4-125(a) and (b). In other words, a good faith belief of a carrier that an order is authorized or the service is authorized is sufficient to preclude liability under the statute. Similarly, a good faith error by the carrier or the customer is not a slamming or cramming violation in Tennessee.¹⁰ The statute requires a showing of the carrier’s knowledge or intent. The provider must either know that the switch or the act of billing and collection was unauthorized or “reasonably should have known” that the switch, or the billing and collection was not authorized.

With respect to the first alternative, the evidence must demonstrate that Talk.com had actual knowledge that the subscriber did not authorize a switch or the service. Actual knowledge would require evidence that Talk.com knew, in fact, that the subscriber did not want Talk.com’s service but that it intentionally switched the subscriber’s service or billed and collected from the subscriber in spite of this knowledge. *See, e.g., State v. Pendergrass*, 13 S.W.3d 389, 393 (1999) (“[t]he general *mens rea* provisions of the Criminal Code provide, ‘ ‘Knowing’ refers to a person who acts knowingly with respect to the conduct or to circumstances surrounding the conduct

¹⁰ This standard contrasts with the applicable federal statute, 47 U.S.C. § 258. Under Section 258, “slamming” occurs if the carrier has “submit[s] or execute[s]” a preferred carrier change without first complying with the verification procedures specified by the FCC. 47 U.S.C. § 258. Nothing in Section 258 mentions a carrier’s knowledge at the time of the switch, nor does the text of the statute set forth a constructive knowledge standard like § 65-4-125(a)’s “reasonably should know” standard. Indeed, the FCC has said on many occasions that Section 258 does not require evidence of a carrier’s intent. *See, e.g., All American Telephone, Inc., Forfeiture Order*, 16 FCC Rcd 16601, ¶ 6 (2001).

when the person is aware of the nature of the conduct or that the circumstances exist.”) (citing Tenn. Code Ann. § 39-11-302(b); emphasis in original; *Wilkins v. Dodson, Parker, Shipley, Behm & Seaborg*, 995 S.W.2d 575, 580 (1998) *cert. denied* (1999) (for purposes of the “discovery rule,” actual knowledge of an injury means “where, for example, the defendant admits to having committed malpractice or the plaintiff is informed by another attorney of the malpractice”) (citing *John Kohl & Co. P.C. v. Dearborn & Ewing*, 977 S.W.2d 528, 532-33 (Tenn. 1998)); *Hardesty v. Service Merchandise, Inc.*, 953 S.W.2d 678, 682 (1997) (“Plaintiffs have not shown that Defendant either placed the bed rail in the allegedly dangerous position or had actual notice of the allegedly dangerous condition on its premises.”). Only if the evidence demonstrates intentional slamming is the actual knowledge element of the law satisfied.

With respect to the second alternative, the evidence must show that Talk.com “reasonably should [have] know[n]” that the subscriber did not give authorization to switch or subscribe the service. This standard is similar to a “constructive knowledge” standard used in other contexts under Tennessee law. See, e.g., *Hardesty v. Service Merchandise, Inc.*, 953 S.W.2d 678, 682 (1997) (in Tennessee negligence cases, “[i]f liability is to be predicated on constructive knowledge by the Defendant, the proof must show the dangerous or defective condition existed for such length of time that the Defendant knew, or in the exercise of ordinary care should have known, of its existence.”) (citing *Jones v. Zayre, Inc.* 600 S.W.2d 730, 732 (Tenn. App. 1980)). This test thus can be satisfied only if the evidence demonstrates that Talk.com, in the exercise of ordinary care, should have known that authorization was not provided. “Ordinary care” in this context is to be measured based upon prevailing standards or practices applicable to entities or persons in the telecommunications industry. See e.g., *Snider v. Snyder*, 855 S.W.2d 588 (1993).

Finally, each of these knowledge elements must be evaluated based upon knowledge that Talk.com had at the time that an order was submitted or a bill was rendered. Tenn. Code Ann. §§ 65-4-125(a) and (b) makes it unlawful to “designate” or “change” the subscriber’s carrier or to “bill and collect” for unauthorized services in the instances described above. The actions prohibited by § 65-4-125(a) – designating a carrier or changing a carrier – occur at the time that the carrier submits an order. Similarly, the actions prohibited by § 65-4-125(b) – billing and collecting for service - occurs when the carrier submits the bill to the customer. Therefore, the requisite knowledge must be judged at this time as well. *Cf. Hardesty*, 953 S.W.2d at 683 (constructive knowledge by premises owner of dangerous condition on premises cannot be established without some showing of length of time dangerous condition had existed). Knowledge that Talk.com acquires (or should have acquired) after the fact, whether by the receipt of a complaint or through contact from the subscriber or another carrier, does not alter what Talk.com knew or should have known at the time it submitted an order or issued a bill. Similarly, the subscriber’s unhappiness with a feature of the service or the subscriber’s later decision to change his or her mind does not alter in any way the validity of the subscriber’s initial authorization. The relevant inquiry under Tenn. Code Ann §§ 65-4-125(a) and (b) is what Talk.com knew or should have known at the time it submitted the carrier change orders or the bills in issue.

IV. ALLEGED SLAMMING VIOLATIONS – PROMOTIONAL CHECKS

A. TALK.COM DID NOT KNOW OR HAVE REASON TO KNOW THAT ANY OF THE PROMOTIONAL CHECK SOLICITATIONS WERE NOT AUTHORIZED

The Show Cause Order alleges fifteen (15) instances in which it is claimed that the Company violated Tenn. Code Ann. § 65-4-125(a) by switching the subscriber’s

telecommunications service provider through the use of promotional checks. As set forth below, the Company demonstrates that none of these incidents violated Tenn. Code Ann. § 65-4-125(a). Specifically, in four (4) of the incidents, Talk.com had actual authorization from the subscriber controlling the number. In seven (7) instances, Talk.com had apparent authorization and did not know or reasonably should have known that the true subscriber did not give authorization. In the remaining four (4) instances, there is no way that Talk.com could have known or could have had reason to know that the subscriber did not give authorization.

1. Talk.com Had Actual Authorization for Four of the Switches in Issue

Talk.com in fact, obtained valid authorization to switch telecommunications service providers for four of the telephone numbers at issue in the Show Cause Order. These four Counts are: Robert Whitaker (Complaint No. 12; Count 23); Gerald Cochrane (Complaint No. 3; Count 5); Jim Landers d/b/a Whitts Barbecue (Complaint No. 7; Count 13) and Kerry Beyer (Complaint No. 15; Count 29).

In two of these instances, those of complainant Robert Whitaker and complainant Gerald Cochrane, the Company had valid authorization from the “subscriber” for the telephone number printed on the promotional check. See **Exhibit A-12 and A-3** for additional information. In fact, at the time each promotional check was cashed, the individual to whom the telephone number then was assigned, signed and cashed the promotional check and authorized Talk.com to make the switch. See **Exhibit A-12** (Whitaker; check signed by Robert Whitaker); **Exhibit A-3** (Cochrane; check signed by Judy Holshoe).¹¹ Talk.com received such authorization and submitted its order based on that authorization.

¹¹ It does not appear in either instance that the CSD disputes this subscriber did, in fact, have authority over the telephone number in question at the time authorization was given. See, e.g., *Show Cause Order* at 7 fn. 6 (admitting that Judy Holshoe cancelled her service with BellSouth after giving authorization to Talk.com).

In each case, it appears that the subscriber moved or terminated service *after* giving Talk.com valid authorization. See **Exhibit A-12** (Whitaker; check signed by Robert Whitaker); or see Show Cause Order at 7, n.6 and **Exhibit A-3** (Cochrane; check signed on 7/12/00 but service terminated on 7/30/00). Talk.com was not informed by the individual *or* by BellSouth either when it submitted the request to change telecommunication service providers to BellSouth or prior to completing the provisioning of the order that the number was no longer assigned to the subscriber that gave Talk.com authorization. As a result, Talk.com had valid authorization at the time it submitted the order to switch these telephone numbers and therefore did not violate Tenn. Code Ann. § 65-4-125(a) in either instance.

In the case of the other two complainants, Whitts BBQ and Kerry Beyer, Talk.com received authorization from a subscriber to switch that subscriber's main number and "all associated lines." Talk.com requires the "associated line" authorization because it is the policy of BellSouth to automatically switch all associated lines even if the order specified only some of the subscriber's local lines.¹² See **Exhibit D**, *Affidavit of Jeff Earhart*, at 4. In order to avoid such rejections, Talk.com's LOAs for local services specify that the authorization applies to the specific telephone number(s) identified and to all lines associated with such numbers.¹³ See **Exhibit 7** (promotional check) and **Exhibit 15** (promotional check) to the Show Cause Order.

Both complainant Whitts BBQ and complainant Kerry Beyer¹⁴ allege that Talk.com intentionally

¹² That is, BellSouth does not allow a subscriber to choose BellSouth for some of its local lines but a competitor for others.

¹³ Talk.com uses this language only on LOAs that involve conversion of local service from BellSouth. Talk.com's long distance LOAs, where BellSouth does not employ this policy, do not include associated lines language.

¹⁴ Due to an inadvertent problem that occurred when the Company completed its UNE-P (unbundled network element platform) conversion, Kerry Beyer's telephone number generated two accounts in the Company's system. Talk.com received an additional SOC from BellSouth on February 22, 2001, switching again the local, local toll and long

switched the service provider of their telephone service without their authorization, when in fact their telephone numbers were switched based on valid authorization given by another subscriber. *See Exhibits A-7 and A-15.* The validity of these subscribers' authorization is not disputed.

In order to implement these subscribers' requests that "all associated lines" be switched, Talk.com relied upon information it received from the subscribers' LEC, BellSouth. Specifically, Talk.com relied upon the Customer Service Record ("CSR") data made available to Talk.com from BellSouth to determine which lines were "associated lines."¹⁵ Talk.com is entitled to rely upon this CSR, for it must be provided to all carriers on a non-discriminatory basis using the same information made available to BellSouth retail.¹⁶ In this case, BellSouth's CSRs identified the lines in issue as associated with those for which Talk.com obtained authorization. *See Exhibit A-7* (CSR for 615-443-8649; 615-443-1919 identified by BellSouth as "associated"); *Exhibit A-15* (CSR for 901-754-2885; 901-755-1937 and 901-757-3766 identified by BellSouth as "associated").

2. Talk.com Had Apparent Authorization for the Other Promotional Checks

Each of the remaining eleven (11) promotional check incidents involve checks that were printed, mailed to a target subscriber, signed and cashed by the subscriber, and provisioned by Talk.com based upon this authorization. In each instance, the CSD alleges that the number

distance service for BTN (901) 754-2285 and *all associated lines*, including (901) 754-1937 and (901) 757-3766

¹⁵ A Customer Service Record or "CSR" is an integral element of the pre-ordering functions which is defined as "the exchange of information between telecommunications carriers about current or proposed customer product and services or unbundled network elements or some combination thereof." *See* Second BellSouth Louisiana Order, 13 FCC Rcd. 20599, 20660 ¶ 94 (1998). "Competing carriers need access to this information to place orders for the products or service their customers want." *Id.*

¹⁶ *See* 47 U.S.C. § 251(c)(3) (requiring ILEC to provide useful, nondiscriminatory access to network elements); 47 C.F.R. § 51.307.

switched was controlled by a different subscriber – not the subscriber to whom Talk.com mailed the promotional check and upon whose authorization Talk.com relied. Even if it is demonstrated that these complainants did not have any connection with the persons or addresses on the checks,¹⁷ Talk.com did not violate Tenn. Code Ann. § 65-4-125(a) in any of these instances because Talk.com (1) had apparent authorization upon which it, in fact, relied and (2) did not know, nor reasonably should it have known, at the time it submitted the order, that the authorization upon which it relied was not valid.

In the section below, Talk.com addresses two issues related to these incidents. First, Talk.com will show that several of the incidents are attributable to errors caused by similar subscriber names or listings, or are the result of data errors that commonly can occur in direct mail campaigns. Second, Talk.com will describe the procedures it used in promotional check campaigns, the procedures it relied upon to correct as many errors as possible, as well as the further improvements Talk.com implemented in 2001 to these promotional check procedures. These actions, taken together, demonstrate that Talk.com did not violate Tenn. Code Ann. § 65-4-125(a) in connection with any of the mistaken switches alleged in these 11 incidents.

a. Switches Resulted From Similar Names or Listings

As with any form of direct mail marketing, some errors in the data contained on the promotional check are inevitable. In 4 of the 11 instances of apparent authorization, the individual authorizing the switch of the telecommunications service, had the same name as the complainant or a very similar name. *See* John Smith (Complaint No. 1; Count 1) (check cashed by “John Smith”); C. [Chris] Pat Anderson (Complaint No. 10; Count 19) (check cashed by “Chris Anderson”); Julie Helton (Complaint No. 9; Count 17) (check cashed by “Joy Hilton”);

¹⁷ Talk.com has requested depositions in some of these instances in order to pursue this issue.

Sharon Jones (Complaint No. 14; Count 27) (check cashed by "Shirley Jones"; both complainant and Shirley Jones listed in directories as "S. Jones"). See **Exhibit A-14**; see also *Affidavit of Dwayne Morton* attached hereto as **Exhibit E**. For additional information, please see **Exhibits A-1, A-10, A-9 ,and A-14**. These switches all occurred despite the fact that, as explained *infra*, each one of the subscribers cashing promotional checks were asked to correct any erroneous information contained on the check. None of them did so in these instances. See Exhibits 1-11; 13-15.

Moreover, each of these switches occurred without Talk.com receiving any actual notice that the subscriber was someone other than the person signing the check. See Exhibit C, Affidavit of Francie McComb. To the contrary, the LOAs that Talk.com received were, on their face, valid and appeared to give the subscriber's authorization for the switch that occurred.

The problems associated with these 4 complainants are common and unavoidable when using direct mail marketing methods. The Company reasonably acted on apparent authorization from individuals either named the same or with similar names, believing that it had the right subscriber. In short, the Company did not slam these individuals.

b. Switches Resulting from Data Errors that went Uncorrected by the Customer and Undetected by Talk.com

In the remaining 7 of the 11 instances of apparent authorization, the mistakes resulted from data errors that were (1) not corrected by the subscriber that signed the promotional check and (2) were not discovered by Talk.com before it processed the sales order.

In the instance of Barbara DeBlasio (Complaint No. 13; Count 25), the check was mailed to a different subscriber, but listing Ms. DeBlasio's telephone number. Ms. DeBlasio recognized the subscriber who gave authorization, however, and described the person as "a family friend." See **Exhibit A-13**. Talk.com has requested to take the deposition of Ms. DeBlasio to determine

the extent to which she knew of the family friend's decision to cash the check, and the extent to which she may have authorized the family friend to do so. In any event, Ms. DeBlasio and the subscriber apparently had some connection in the past, which may have accounted for the data error resulting in the family friend's name and address being associated with Ms. DeBlasio's telephone number.

Similarly, each of the other six (6) instances involve promotional checks that were, in fact, signed and cashed by the target subscriber to whom they were mailed. See Exhibits A-2, A-4, A-5, A-6, A-8 and A-11. For reasons unknown to the Company at this time, the target's name and address became associated with an incorrect telephone number. It is possible that such an error occurred because *the target* used to control the telephone number in question (*cf.* Judy Holshoe/Gerald Cochrane). In addition, it is possible that such an error occurred because *the complainant* used to be associated in some manner with (a) the target, such as in a roommate, spousal or "family friend" relationship (*cf.* Barbara DeBlasio/Jimmy Workman/A-13) and/or (b) the address to which the promotional check was mailed. It also is possible that the errors occurred through the transposition of telephone numbers (*e.g.*, 555-1212 became 555-2121) or through the transposition of addresses. Finally, in some instances errors may have been introduced in third party databases during the implementation of area code splits or during mass updates to these databases. Although Talk.com cannot explain how these errors occurred, the Company was not aware of the error, nor was there an easy way to detect such errors.

c. Talk.com Did Not Have Reason to Know Any of the Authorizations were Invalid.

As previously stated, § 65-4-125(a) makes it a violation to switch a customer's telecommunications service provider only if the provider "*knows or reasonably should know* that such provider or person does not have the authorization of such subscriber." Tenn. Code Ann. §

65-4-125(a) (*emphasis supplied*). As explained below, Talk.com's check validation procedures were reasonable – and in any event were improved by the Company during 2001. These procedures demonstrate that the Company took due care to eliminate mistakes like those that apparently occurred here. Accordingly, it cannot be shown that, at the time the order was submitted, Talk.com reasonably should have known that it lacked the true subscriber's authorization for any of the promotional checks.

i. Talk.com Had In Place Numerous Safeguards to Ensure that the Company Receives Valid Authorizations in Response to Promotional Checks

Talk.com has in place a number of procedures, all reasonably calculated to prevent errors in orders resulting from promotional checks and to ensure that the authorization to switch the customer's telecommunication service provider is valid. To the best of Talk.com's knowledge, these procedures are similar to procedures used by other major telecommunications carriers that extensively utilize promotional checks in their marketing, including AT&T and MCI WorldCom.

Before describing the specific procedures used by Talk.com, it is necessary to understand the process involved in solicitations through the use of promotional checks. Promotional checks are commonly used by a number of carriers to market telecommunications services. They represent a convenient and effective method of inducing customers to try new services. In fact, the benefit to the subscriber is immediate, in the form of cash available for any use the subscriber wishes. Nevertheless, in order for a promotional check to form the basis of a switch, *all* of the following events must occur:

1. The check must be printed with the target's name, address and telephone;
2. The name and address must be sufficiently correct that the U.S. Postal Service will deliver the letter as addressed;
3. The target must sign the check;
4. The target must present the check for payment to his bank and/or a financial institution;

5. The bank or financial institution must accept the check and present it to Talk.com's bank for payment;
6. Talk.com must receive notification that the check has been cashed and must process an order based upon that authorization.

If a fatal defect occurs at any point in this process, then the order cannot go through. For example, if the address is undeliverable, the promotional check will be returned to Talk.com without processing. If the name and address are outdated, forwarding instructions may have expired and, again, the check would be returned to Talk.com without processing. Similarly, if there are any concerns over the validity of the signatures on the check, the bank or financial institution may refuse to accept the check for payment. In the cases discussed in the Show Cause Order, however, none of the errors were significant enough that any of these fatal defects occurred. Instead, the errors were minor enough not to be detected, but significant enough to cause an incorrect switch to occur.

Talk.com's process for the mailing of promotional checks is as follows. Initially, Talk.com looks to obtain the most reliable lists of potential customers commercially available. Like most carriers, Talk.com frequently purchases "lead lists" from a number of commercial sources. Talk.com screens its sources to ensure that it obtains information only from reputable entities with a history of providing quality services. In addition, all of Talk.com's sources are in the business of providing marketing information and all advertise the validity of the information contained therein. Representative vendors used by Talk.com include Acudata (a.k.a. Expedian data) and AOL.

Talk.com does not rely solely on these third party lists for its marketing, however. Before a mailing list is used, Talk.com reconciles and revises these mailing lists in comparison with its state specific or solicitation lists and with other Talk.com databases of telephone numbers and associated names and mailing addresses. *See Affidavit of Greg Luff*, attached hereto

as **Exhibit E**. For example, Talk.com screens out any persons that are current Talk.com customers, or any persons that requested not to be contacted by Talk.com in the future.¹⁸ Further, Talk.com utilizes the promotional checks themselves to correct any errors that may be included in the lead lists it obtains. Talk.com included several statements on its promotional checks designed to guard against inaccurate information in the pre-printed check. Each promotional check prominently discloses that cashing the check will result in a switch to Talk.com. Specifically, the front of each promotional check contains, at the top and in capital letters, the following statement:

**THE SIGNING, CASHING AND/ OR DEPOSITING OF THIS
CHECK WILL SWITCH MY LONG DISTANCE, LOCAL TOLL
AND LOCAL TELEPHONE SERVICE TO TALK.COM HOLDING
CORP.**¹⁹

This information, in addition to satisfying requirements of the FCC's and the TRA²⁰ rules, serves to put the subscriber on notice that its actions will result in changes to the subscriber's telephone services. This helps to ensure that the subscriber focuses on the telephone-related information contained on the promotional check to ensure it is accurate.

In addition, the front of each promotional check contains a pre-printed name, address and telephone number of the solicited customer. This information, in addition to satisfying the FCC's and the Authority's rules, serves to provide notice of the specific phone numbers that would be switched if the customer signs and cashes the check. Moreover, Talk.com warns the

¹⁸ Talk.com places persons who do not wish to be called on its "Do Not Call" list. *See Exhibit H, Affidavit of Brian Carroll, at 3.*

¹⁹ In addition Talk.com is clearly designated as the carrier of choice on the LOA. Statements to this effect are contained on both the front *and the back* of the promotional check.

²⁰ *See* Tenn. Comp. R. & Reg. 1220-4-2-.56(2)(a)(3).

customer that this information must be correct. Directly above the telephone number, the promotional check contains the following statement:

“If the telephone number or address is printed incorrectly, please make changes on the reverse side.”

When the individual endorses the check, the reverse side contains the following statement, again, bolded and in all caps: **“IMPORTANT – PHONE NUMBER MUST BE CORRECT.”**

Directly below this statement, the promotional check provides space for the subscriber to correct an incorrect telephone number.

The purpose of these statements is as obvious as it is important. These warnings are placed prominently on the promotional check because the subscriber's actions in signing and cashing the check will have specific consequences, namely, the switching of the telecommunications services for the phone number listed on the check. Because the signing subscriber will in all cases know his or her own telephone number, the subscriber is the last and best line of defense to ensure the accuracy of the information Talk.com relies upon to submit its carrier change order. The subscriber also is the only person with up-to-date knowledge of changes that have occurred in the time since the lead lists were first created. We live in a very mobile society, with customers frequently moving, changing telephone numbers, and making other changes in their telephone services. While Talk.com attempts to account for these changes by purchasing reliable lists from reputable sources and by “scrubbing” those lists against information in Talk.com's own databases, the promotional check process takes some time. Inevitably, there will be changes that occur since the process began (or errors that were undetected in the process): the subscriber is in the best position to know of and to correct these errors.

That is not to say that some individuals might not intentionally seek to defraud both Talk.com and the person controlling the telephone number to be switched. Nevertheless, the Company always has to rely, to a certain degree, on the knowledge and good faith of the individual providing it with authorization. For example, Talk.com has no way of verifying that an individual who represents himself as authorized to make decisions with respect to a telephone number is, in fact, authorized. Talk.com must rely upon that person to report such information accurately. Indeed, this is precisely the same situation the TRA faces with respect to individuals seeking to be included on the Tennessee "Do Not Call" list. The Tennessee rules clearly specify that only the subscriber may make a "Do Not Call" request,²¹ but the TRA does not conduct any independent verification of the subscriber's authority before accepting a request on the list. *See* Response of CSD to Talk.com's First Request for Production, Item Nos. 1/19 (Tennessee Do Not Call program documents).²² No one can reasonably prevent all instances of fraud or intentional misstatements. Talk.com, like the TRA in connection with "Do Not Call" requests, sometimes must rely upon the subscriber to be honest and to get it right. That is precisely what Talk.com did with respect to its promotional checks.

ii. Further enhancements implemented in 2001

Despite these protections, Talk.com worked in 2001 to improve the overall accuracy of its promotional check procedures. Talk.com has implemented new procedures to improve its processes both *before* a promotional check is mailed and *after* the promotional check is cashed.

The first set of procedures are designed to discover mismatched names/phone numbers *prior to* the mailing of these checks to its prospective customers. As described above, the

²¹ *See* Tenn. Code Ann. § 65-4-404; *see generally* Tenn. Comp. R. & Reg. 1220-4-11-.01.

²² Indeed, there were approximately a dozen instances of mismatched names among the 56 alleged Do Not Call incidents described in the Show Cause Order. *See Exhibit E, Morton Aff.*

Company's policy always has been to "scrub" its lead lists by checking these lists against any available state-specific do not call/solicit lists and information databases prior to mailing out promotional checks. In addition, beginning in April, 2001, the Company began also checking all customer names and BTNs against a third party vendor's nationwide 411 database to obtain the most current, up-to-date name and BTN information available prior to mailing a promotional check. This practice was extremely expensive and time-consuming, but the Company tried it in order to reduce errors that were present in its mailing lists. Talk.com strives to ensure that all information printed on its promotional checks is accurate.

Talk.com also has implemented new procedures to verify the information on promotional checks during the provisioning process (*i.e.* after such checks have been cashed). For local exchange customers, Talk.com began in January 2001 to compare manually the CSR that it receives from the LEC with the name and address of the customer who approves the sale/has signed the check, before provisioning service. *See Exhibit D, Affidavit of Jeff Earhart, at 4.*²³

For long distance customers, the Company implemented an automated computer process in May 2001 that matches up the billing name and address ("BNA") or CSR, where available, with the telephone numbers that the Company has on file for the customer. In instances where the customer name/BTN matches are incorrect, the Company assigns its provisioning staff to manually review the information to determine whether the authorization is valid. The Company's policy is not to provision promotional checks until and unless the customer information has been verified through available records.

²³ This process, too, is very expensive to implement. Manual comparisons require the time and effort of Talk.com's provisioners, thereby slowing down the provisioning process and increasing Talk.com's personnel costs.

iii. The Company is experimenting with New Check Processes

Ultimately, the cost and effort of implementing these new procedures became exorbitant. Thus, early in 2001, Talk.com temporarily suspended the issuance of new promotional checks and ceased processing orders resulting from outstanding promotional checks. The Company has not issued promotional checks in the State of Tennessee since June 1, 2001. This suspension was implemented to allow the Company to explore other options for issuing and processing promotional checks in an economical and sensible manner.

One such alternative that the Company is testing involves the use of a new program in which a customer receiving a promotional check first must call the Company to receive a code that must be entered on the check before it may be cashed. At the time the customer contacts the Company, Talk.com representatives will verify the customer's correct BTN, name and billing address in order to avoid provisioning service to an incorrect BTN. If this program proves successful, the Company intends to implement the revised procedure for all future promotional checks, including those it may choose to issue in Tennessee in the future.

B. THE COMPANY DID NOT VIOLATE THE TECHNICAL REQUIREMENTS OF THE AUTHORITY'S RULES CONCERNING PROMOTIONAL CHECKS.

The Show Cause Order alleges that Talk.com failed to comply with Tennessee rules and regulations with respect to the use of promotional checks and corresponding LOAs, to solicit and authorize the switch of telecommunication service providers. *See* Tenn. Comp. R. & Reg. 1220-4-2-.56. Specifically, the TRA claims that Talk.com failed to comply with rules relating to the LOA contained on the promotional check. In particular, the TRA alleges that Talk.com's LOA failed to contain three (3) clear and unambiguous statements that confirm specific requirements set out in the Tennessee LOA rules. The Company asserts, contrary to the position of the CSD

that the Company, that its LOAs were in compliance with all material requirements of the Authority's rules.

1. **Tenn. Comp. R. & Reg. 1220-4-2-.56(2)(a)(4)(iv)**

The TRA alleges that the LOA failed to, in clear and unambiguous language, identify that the "preferred local exchange, preferred interLATA, or preferred intraLATA carrier must be the carrier directly setting rates for the end user" in compliance with. Tenn. Comp. R. & Reg. 1220-4-2-.56(a)(4)(iv). Contrary to the CSD's claims, the Company did not fail to confirm the customer's carrier choice on the promotional check, as the CSD alleges. Tenn. Comp. R. & Reg. 1220-4-2-.56(2)(a)(iv) requires that "[a]ny carrier designated in a letter of agency as a preferred local exchange, preferred interLATA, or preferred intraLATA carrier must be the carrier directly setting rates for the end user." Literally, this requires that the carrier "designated in the letter of agency" possess certain characteristics, namely, that the carrier be the rate-setting carrier. The promotional checks used by the Company satisfy this requirement.

In fact, the front of the check contains, in capital letters, the statement that

"THE SIGNING, CASHING AND/ OR DEPOSITING OF THIS CHECK WILL SWITCH MY LONG DISTANCE, LOCAL TOLL AND LOCAL TELEPHONE SERVICE TO TALK.COM HOLDING CORP."²⁴

This language clearly indicates that the customer is selecting Talk.com to be its telecommunications service provider. There is no ambiguity in the statement used, nor is there any confusion as to whether service will be provided by Talk.com or another entity. In addition, there is no dispute that Talk.com is, in fact, the carrier that sets the rates for the services selected. Thus, the requirements of the Authority's "rate-setting carrier" rule have been satisfied. Further, Talk.com notes that the Authority's rules do not require that a specific statement be used; there is

not precise language that the Company must include in the LOA on its promotional checks. Therefore, the Company has discretion to select the language that satisfies the rule's requirements. The Company denies any allegations raised by the CSD that its LOAs failed to include the statement required by Tenn. Comp. R. & Reg. 1220-4-2-.56(2)(a)(iv). **See Exhibits 1-15.**

2. Tenn. Comp. R. & Reg. 1220-4-2-.56(a)(4)(i)

The TRA alleges that "[t]he end user's billing name and address and each telephone number to be covered by the local and/or interLATA or intraLATA long distance service change order" is not clearly and unambiguously identified in the LOA in compliance with Tenn. Comp. R. & Reg. 1220-4-2-.56(a)(4)(i). The promotional checks did not fail to provide end user's billing name, address and telephone number as required by of Tenn. Comp. R. & Reg. 1220-4-2-.56(2)(a)(i), as the CSD alleges. This mirrors the FCC rule, which requires LOAs to list "each phone number to be switched." 47 C.F.R. 64-1130. In compliance with this, each check is pre-printed with the target's name, address and telephone number. The promotional checks issued by the Company clearly indicate the end user's name and address and the each telephone number to be covered. Moreover, if there is an error on the promotional check, the Company specifically asks the customer to make any necessary changes and the promotional check provides space for the changes to be indicated. **See Exhibits 1-15.**

The CSD seeks to convert Talk.com's clear compliance with the rule into a violation by misrepresenting the requirements of the rules. Specifically, the CSD ignores the rule's literal language that states that the LOA must "confirm ... each telephone number to be covered [by the change]." Instead, the CSD seeks to read § 1220-4-2-.56(a)(4)(i) to require that the telephone number affirmatively be "correct." This attempt to boot-strap a slamming allegation into a rule

violation not only does an injustice to the rule's requirements, but also misapplies the "knowledge" standard of the slamming rule. The CSD's standard is impossible in this context. As stated above, the Company already takes every reasonable effort to ensure the information contained on the pre-printed promotional check is accurate. But because people move and change telephone numbers frequently, all checks have lines for customer to correct pre-printed information. The CSD's position would lead to the conclusion that the simple act of printing and sending out the promotional check by the Company that contains an incorrect or misspelled name, address or telephone number, is equivalent to a rule violation and would be an automatic violation of the TRA's rules and regulations *even if* the individual to whom the check was addressed never cashed the promotional check or if the Company *never provisioned service* to the customer.

3. Tenn. Comp. R. & Reg. 1220-4-2-.56(a)(4)(v).

Finally, the CSD alleges that the LOA used by Talk.com fails to state that "[t]he end user understands that any local exchange and/or interLATA or intraLATA carrier selection the end user chooses may involve a charge to the end user for changing the end user's local and/or interLATA or intraLATA long distance carrier" in accordance with Tenn. Comp. R. & Reg. 1220-4-2-.56(a)(4)(v). The Company contends that based on the FCC's decision to eliminate this requirement in August 2000, in order to "alleviate consumer confusion,"²⁵ the Company is not required to include this statement. Because the FCC expressly eliminated this statement, the Tennessee rule requiring such notification is in direct conflict with the FCC's rules and therefore, is preempted by the federal rule. Furthermore, since Talk.com does not charge any fees to switch local and long distance carriers (and picks up any ILEC-imposed fees), the inclusion of

this statement is unnecessary and potentially confusing. Therefore, the Company does not believe it should be assessed liability for not including such a statement.

Please see **Exhibits A-1 to A-15**, which contain a summary of the Company's findings concerning the fifteen (15) individuals included under this category by the CSD in the Show Cause Order and the Company's supporting documentation.

As shown in these summaries, authorizations provided from the LOAs contained on the promotional checks issued by Talk.com and used to solicit and authorize the switch of telecommunications service providers for customers in Tennessee are valid. The Company has not violated Tenn. Code Ann. §65-4-125(a), as the CSD alleges. The Company did not know nor should the Company reasonably should have known, that the authorization was invalid. The Company respectfully denies any liability for the 15 individuals included in this section.

V. SLAMMING ALLEGATIONS – TELEPHONE SOLICITATION

A. TALK.COM DID NOT VIOLATE THE TENNESSEE CODE BY USING TELEPHONE SOLICITATION TO SOLICIT AND AUTHORIZE THE SWITCH OF TENNESSEE CUSTOMER'S TELECOMMUNICATIONS SERVICE PROVIDERS

The Show Cause Order alleges that the Company violated Tenn. Code Ann. § 65-4-125(a) by switching the telecommunications service provider, through the use of telephone solicitations. As set forth below, the Company denies that its actions violated § 65-4-125(a).

1. Talk.com Had Valid Authorization

Contrary to the CSD's conclusions that Talk.com failed to secure the authorization of individuals contained in the Show Cause Order, Talk.com in fact, obtained valid authorization to switch telecommunications service providers for four (4) of the fifteen (15) telephone numbers contained at issue in the Show Cause Order. These individuals, complainant Rose Matthews, (Complaint No. 16, Count 33), complainant Jeanette Deming (Complaint No. 20; Count 39),

complainant Carol O’Gorman (Complaint No. 25; Count 49) and complainant Lisa Switter (Complaint No. 28; Count 54), each gave their express oral consent to change their local, local toll and long distance telecommunications service provider to Talk.com. *See Exhibits A-16, A-20, A-25, and A-28* for additional information. *See also* Exhibit G, *Affidavit of Stacy Smith*, attached hereto as **Exhibit G**.

In the case of complainants Clare (Complaint 23, Count 46) and Switter (Complaint 28, Count 55), the CSD based its allegation of slamming on the fact that Talk.com had been unable to obtain copy of the taped verification from its verification company. *See Show Cause Order* at 28, 33. Talk.com has now obtained these verifications, which are appended hereto at **Exhibit A-23, A-28**.²⁶ In the case of complainant Matthews, the complainant was a subscriber for over seven months before making a complaint. Moreover, the complainant (and the CSD) admit that authorization was given for two of the lines serviced by Talk.com; the dispute is limited solely to two additional lines.²⁷ *See Show Cause Order* at 21. These additional lines were authorized for conversion as “associated lines” to the Matthews’ account. **Exhibit A-16**. The Matthews verification was completed by an automated verification system, Voicelock retrieval system and multiple numbers were entered into the system. Furthermore, based on BellSouth’s policy to convert all associated lines upon submission of one line, all of the Matthews lines must be converted in order for BellSouth to process the Matthews’ change request. *See Earhart Aff.* Finally, in the case of complainant Deming (Complaint 20, Count 40), at the time she canceled

²⁶ In addition, because these authorizations may be disputed, Talk.com has requested to take the depositions of both of these complainants.

²⁷ Talk.com notes that it has requested to take the deposition of the Matthews’ in order to address the reasons for their substantial delay before claiming an unauthorized switch and to explain the circumstances of their alleged partial authorization.

her service, she failed to select a provider for interLATA and interstate long-distance, and BellSouth defaulted by assigning those services back to Talk.com. *See Exhibit A-20.*

a. Talk.com had valid authorization – Cancellation issue

In addition to the 4 complaints listed above, the Company had valid authorization for an additional three (3) of the 15 telemarketing incidents. Two of these involve issues surrounding cancellation of service and not disputed authorization. Complainant Gary Butler (Complaint No. 22; Count 44) authorized the switch of his local, local toll and long distance service provider to Talk.com, however, due a delay in canceling his authorized service, BellSouth processed the Company's order to switch instead of recognizing the pending cancellation order.²⁸ In instances where a customer requests a cancellation while the order to switch is still pending, Talk.com cannot guarantee that an order will be cancelled before it is provisioned. This is precisely why the Company informs the requesting customer to contact BellSouth to cancel an order. BellSouth can complete a cancellation request. *See Earhart Aff.*

For complainant John Montgomery (Complaint No. 30; Count 58), due to an inadvertent problem that occurred when the Company completed its UNE-P (unbundled network element platform) conversion, Mr. Montgomery's telephone number generated two accounts in the Company's system. Please see **Exhibits A-22 (Butler) and A-30 (Montgomery)** for additional information. In neither instance did Talk.com intend to switch the customer's service after receiving the customer's notice of cancellation.

The other incident, Dorothy Curvin (Complaint No. 18; Count 35), was authorized by the subscriber in a taped verification submitted to the CSD. Although the CSD apparently contends that the verification should have been rejected (*see Show Cause Order at 23*), Ms. Curvin in fact

²⁸ *See CSD Response to Question 19 of the Company's Request for Production of Documents.*

responded affirmatively to each of the verification questions asked. *See Affidavit of Stacy Smith; Exhibit A-18.*²⁹ Moreover, the alleged second switch did not involve a switch at all. Ms. Curvin's failure to select a new carrier resulted in Talk.com's action of blocking her account (at her request) and prompted her erroneous claim of a second switch. Please see **Exhibit A-18** for additional information concerning this complaint.

b. Talk.com had valid authorization – Scope of authority issue

In addition to the seven individuals listed above, the Company had authorization to switch the telecommunications service provider for complainants Pam Downen (Complaint No. 17; Count 33), John Selkirk (Complaint No. 21; Count 41) and Lori Turbeville (Complaint No. 24; Count 47). In each of these cases, the subscriber admits giving authorization to the Company. *See Exhibit A-17, A-21 and A-24.* In fact, the Company has a taped verification in which the subscriber confirms that authorization during the verification process. *Id.* In each instance, the subscriber now claims that, his or her authorization was limited or conditional in some way. For example, both Pam Downen and Lori Turbeville allege they only authorized the switch of their long distance service when their verification tapes clearly indicate that they authorized the switch of their local toll and long distance service. Please see **Exhibits A-17 and A-24** for additional information concerning these complaints. Please also see *Smith Aff.* Finally, the Company had a valid authorization to switch complainant John Selkirk's local, local toll and long distance providers. His dispute claims that he authorized the switch only if he could have the same features he had with BellSouth. His verification tape indicates that he gave permission

²⁹ It appears upon later examination that Ms. Curvin may not have fully understood the concept of wholesale service provided by BellSouth. Nevertheless, Ms. Curvin confirmed her decision to switch and the independent verifier approved the verification.

to switch all services, without such a caveat. Please see **Exhibit A-21** for additional information concerning this complaint. Please also see Exhibit G, *Smith Aff.*.

Talk.com notes that in each of these instances, the dispute arises from the complainant's contention that, in conversations outside of the verification process, he or she allegedly limited the scope of authorization. This type of dispute can be addressed only through sworn testimony and an opportunity for cross-examination. Thus, Talk.com has requested to take depositions of these complainants in order to elicit additional information concerning the allegations on which the CSD relies.

c. Other Issues

The remaining five (5) complaints involve incidents in which the Company did not know nor reasonably should have known that there were issues with the authorization provided to the Company during the verification process.

i. Data Processing Errors

Two (2) of the five remaining complainants concern problems that occurred during the verification process, unbeknownst to the Company. Complainant Duane Shields (Complaint No. 27; Count 53) alleges the Company switched their telecommunications service provider without their consent. Upon investigation, the Company has discovered that during the verification of James White, the verifier inadvertently processed the switch for BTN (901) 385-6354 (complainant Shields' number) instead of for BTN (901) 358-6354 (James White). Please see **Exhibit A-27** for additional information. Talk.com did not know that this error had occurred, nor did it have reason to believe that its verifier had transposed two of the digits during the

verification process.³⁰ For complainant Janet Clare (Complaint No. 23; Count 45), a problem arose at the end of the verification process, causing the third-party verifier to cancel her authorization but inadvertently place an order without the Company's knowledge of a problem. Please see **Exhibit A-23** for additional information

ii. Verification Tapes

Finally, for the remaining three (3) complainants in this section of the Show Cause Order, complainant Laura Wilson (Complaint No. 19; Count 37), complainant Edith Brown (Complaint No. 26; Count 51) and complainant K.L and Carole A. Owen (Complaint No. 29; Count 56), despite reasonable efforts, the Company has been unable to obtain a copy of the verification tape from the third-party verifier (Traffix, f/k/a Quintel for Wilson and ADC for Brown and Owen). The Company is currently contemplating pursuing alternative avenues for obtaining a copy of the verification tape. In the meantime, the Company has requested depositions of these individuals in order to determine whether authorization was given.³¹

The Company would like to note that it is able to provide the TRA with copies of verification tapes for two (2) individuals, Janet Clare and Lisa Switter, that it was unable to provide the CSD with at the time of the investigation. Please see **Exhibits A-28 and A-23**. Therefore, the Company contends that no liability should be assessed under Tenn. Comp. R. & Reg. 1220-4-2-.56(2)(e) as contemplated in the Show Cause Order (Counts 46 and 55).

³⁰ Many verification companies review each tape for quality control purposes before a final approval is given to the Company. Talk.com did not have reason to know in this instance that this error would go undetected by its verification company.

³¹ Customer consent may be demonstrated by factual evidence other than a taped verification. See Tenn. Comp. R. & Reg. 1220-4-2-.56(2)(d) (failure to produce taped verification creates a *rebuttable* presumption only). The Company intends to demonstrate through depositions that these customers gave their consent, despite the refusal of Talk.com's verification companies to produce the requested tapes.

2. Even if any of these Switches are Determined to be Unauthorized Talk.com Did Not Know that the Switch was Unauthorized, Nor Did It Have Reason to Know.

Even if it is determined that some of the incidents described above were not in fact authorized, that fact alone is insufficient to demonstrate that Talk.com has violated § 65-4-125(a). It must also be shown that Talk.com knew of this lack of authorization, or that it should have known of the lack of authorization. In this section, Talk.com describes its telemarketing sales and monitoring procedures. As demonstrated below, these procedures are designed to detect and prevent unauthorized or improperly authorized switches. These procedures are reasonable, and demonstrate that Talk.com exercised more than ordinary care to prevent the occurrence of an improper switch.

The solicitation and verification scripts used in Tennessee are carefully reviewed by the Company to ensure that the customer understands the nature of the telephone call, either to solicit business or to verify their selection of Talk.com as their new telecommunications service provider. Talk.com utilizes established verification procedures for all customer sign-ups that are in full compliance with applicable rules requirements. *See Luff Aff.*

First, Talk.com remotely monitors its telemarketing staff to ensure full compliance with its established verification procedures and policies regarding the solicitation of customers and the unauthorized transfer of service. On November 1, 2000, the Company established an internal monitoring group, responsible for the remote and random monitoring of all telemarketing calls. This group of thirty (30) individuals monitors both internal and third party telemarketers on a random and anonymous basis, in order to ensure the accuracy and validity of Talk.com's customer verifications and the full compliance of its telemarketers with state and federal slamming requirements. The Company affords the same scrutiny to all of its direct mail and on-

line promotional campaigns. In January 2002, Talk.com outsourced the monitoring to FSH, an independent third party monitoring agent to further boost the independent and quality of the monitoring. *See Luff Aff.*

Second, the Company has consolidated its regulatory department for purposes of reviewing and approving all sales material, including sales and verification scripts and direct mail and promotional materials, to ensure compliance with all applicable laws. To assist in this process, last Spring the Company hired a Director of Regulatory Affairs with seven (7) years experience with the Nevada PUC. The Company has established these centralized groups to ensure strict enforcement of the Company's zero-tolerance policy and to ensure uniform and expeditious Company responses to customer complaints and a heightened awareness of potential verification problems. *See Luff Aff.*

Third, on an ongoing basis, Talk.com's regulatory department reviews its telemarketing and verification scripts to ensure full compliance with federal and state rules regarding the solicitation of customers and the unauthorized transfer of service. The Company affords the same scrutiny to all of its direct mail and on-line promotional campaigns

Fourth, the Company strictly enforces its zero tolerance policy. Any employee or independent contractor who violates Talk.com's zero-tolerance policy is immediately terminated. All independent contractors (telemarketers and third-party verification ("TPV") entities) have been notified of this zero-tolerance practice. All direct agents of the Company receive extensive training and monitoring in the Company's compliance procedures and have been separately notified of the zero-tolerance policy. In October 2000, the Company terminated its relationship with its former telemarketing agent, Traffix (formerly known as Quintel Corporation) due to its belief that the agent engaged in unauthorized marketing promotions and practices. *See Luff Aff.*

In 2001, the Company completed several actions to further improve the anti-slamming policies and procedures outlined above. First, it created a comprehensive sales training manual, which it has distributed to all of its telemarketing agents and employees to provide them with centralized information, including the Company's zero-tolerance policy against slamming and the complaint resolution process with which all of Talk.com's sales and customer service personnel must comply. The Company's training manuals and related materials are now available to its personnel online for ease of distribution and modification.

Telephone solicitation for the Company is conducted predominantly through in-house telemarketers who contact customers from approved lead lists that have been loaded into the company's dialer. That lead list is not used until it is compared with all applicable state "do-not-call" lists as well as the Company's own internal "do-not-call" list. In-house telemarketers contacting customers on the lead list are required to use a telemarketing script that has been pre-approved by the Company's regulatory department. Talk.com also employs a limited number of third party sales agents who are pre-qualified as sales agents by the Company. These third party agents follow pre-approved scripts and all other verification procedures established by Talk.com for outbound and inbound telemarketing. These individuals also must consent to being remotely and anonymously monitored by the Company. *See Luff Aff.*

If the customer elects to use the Company's service, the call is transferred to an independent third party verifier who verifies the order, tapes the call, and then listens to the tape to affirm the order, in accordance with the procedures described herein. Once the verification company is satisfied that the customer's order is complete, the order is sent to the Company for processing. Prior to processing, the Company reconfirms the customer's BNA against that of the customer service record and/or BNA currently on file with the ILEC, where available.

The Company asserts that it did not violate Tennessee slamming rules through the use of its solicitation and verification scripts. As demonstrated above, most of the individuals contained in this section admit to giving authorization for Talk.com to become their telecommunications service provider. In fact, the majority of the complaints relate to problems with billing, provisioning or the selection of particular features and not whether Talk.com should be their carrier. In any event, Talk.com neither knew nor reasonably should have known at the time of any problems with the authorizations upon which it relied.

B. THE COMPANY'S TELEMARKETING SCRIPTS SUBSTANTIALLY COMPLIED WITH THE AUTHORITY'S RULES

In the Show Cause Order, the CSD states "[p]enalties are not contemplated for Talk.com's general use of [the] noncompliant scripts" *See Show Cause Order* at 19, fn. 21. However, the CSD then fails to point to the specific language in or portion of the solicitation or verification scripts that is in direct violation of the Tennessee rules. Because of this, we will focus on the specific incidents in question and not Talk.com's scripts generally.

The CSD alleges that Talk.com failed to comply with Tennessee rules and regulations governing the use of solicitation and verification scripts to solicit and verify the authorization to switch the customer's telecommunication service providers as outlined under Tenn. Comp. R. & Reg. 1220-4-2-.56(3) (solicitation scripts) and 1220-4-2-.56(2)(c) (verifications). Talk.com employs a strict, zero-tolerance, policy regarding conduct that violated Tennessee rules. This includes the use of solicitation scripts to contact individuals in Tennessee. Depending on how the customer is contacted, either directly by the Company or a third-party hired by the Company to solicit its service, or by the customer, Talk.com has specific solicitation scripts to satisfy each type of call. Each script is thoroughly reviewed by the Company's regulatory department; each

individual using the script is trained and monitored by the Company to ensure quality of service and compliance with the rules and regulations.

1. General Script Allegations

The CSD alleges that the Company's scripts failed to include the following statements as set out under Tenn. Comp. R. & Reg. 1220-4-2-.56(3). As set forth below, the Company denies this allegation.

First, the CSD claims that the scripts fail to include a statement that "the purpose of the call is to solicit verbal approval to change the end user's local, and/or intraLATA, or interLATA carrier along with the specific question to the end user, "do you want to change your service?" (i.e., local, PIC or LPIC)" as set out under Tenn. Comp. R. & Reg. 1220-4-2-.56(3)(b). Contrary to the CSD's conclusion, all scripts indicate the purpose of the call as required by Tenn. Comp. R. & Reg. 1220-4-2-.56(3)(b). For solicitation scripts, the purpose is to try to sell the services of Talk.com to the individual, for the verification script, the purpose is to obtain the verbal authorization from the individual wishing to switch their telecommunications carrier to Talk.com. Indeed, each of the complainants on whom the CSD relies seemed to fully understand that the purpose of Talk.com's call was to solicit a change in their telecommunications service provider. The Tennessee rules do not require specific wording to indicate the idea that the purpose of the call is to solicit authorization, and the Company's choice of language reasonably communicates this idea. Therefore, no liability should be assessed to the Company for a violation of Tenn. Comp. R. & Reg. 1220-4-2-.56(3)(b).

Next, the CSD alleges that the Company's scripts failed to contain a statement that "the end user's local, intraLATA, or interLATA carrier may not be changed unless and until the telemarketing sale is confirmed by at least one of the methods outlined in 2(a-c)" as required by

Tenn. Comp. R. & Reg. 1220-4-2-.56(3)(c). The scripts used, however, indicate that the customer must still have the requested switch of their local, intraLATA or interLATA carrier verified through a method approved by the TRA. This is precisely what the Company does. Once the solicitation has resulted in the request of the customer to change their telecommunications service provider, the Company then transfers the call to a third-party verifier, an approved method of verification. The third-party verifier then proceeds to verify the authorization given during the phone solicitation. This process is in full compliance with the requirements under Tenn. Comp. R. & Reg. 1220-4-2-.56(3)(c).

The CSD further alleges that the scripts failed to provide a "description of any charge(s) for processing the carrier change that may be imposed by the customer's local exchange carrier." Tenn. Comp. R. & Reg. 1220-4-2-.56(3)(d). Talk.com believes that because the FCC expressly eliminated the requirement of such a statement, the Tennessee rule requiring such notification is in direct conflict with the FCC's rules and therefore is preempted.

In addition, the CSD alleges that the scripts failed to provide "an explanation of what services (i.e. local, intraLATA, and/or interLATA) are about to be changed and the time frame when the change will occur" as required by Tenn. Comp. R. & Reg. 1220-4-2-.56(3)(f). During both the solicitation and the verification, the Company provides the individual with an explanation that their local, local toll and long distance service is going to be changed to Talk.com's services. Thus, the Company does fully disclose what services will be changed as a result of the authorization. Due to the possibility that the customer's current telecommunications service provider may delay the switching of service by months, Talk.com does not make a specific promise as to when these changes will be implemented. The Company simply cannot predict how long it will take. For some individuals, service can be switched within a week,

while others may take up to four (4) months to provision. Instead, the Company communicates that it will process the order (upon completion of a valid verification, which the Company also tells the customer must take place). This information sufficiently communicates to the customer that a service change is taking place.

Finally, the CSD alleges that the scripts failed to verify that "the end user is an authorized individual". Tenn. Comp. R. & Reg. 1220-4-2-.56(3)(g). The Company verifies that, to the best of its abilities, the individual verifying the solicitation is authorized to make such solicitation as required by Tenn. Comp. R. & Reg. 1220-4-2-.56(3)(g). Generally, the Company asks for a specific individual believed to have authorization. If the individual is not available, or is not the correct person, however, the Company instructs its sales personnel to ask for the authorized person. In addition, during the verification of each sale, the Company's independent verification company specifically confirms the individual on the phone is the individual authorized to make decisions regarding telephone service. This inquiry is enough to satisfy the Tennessee Rules. The CSD cannot require the Company to do any more. There is no database that identifies all persons authorized with respect to a specific telephone number, nor is there any way for a carrier independently to verify a subscriber's claim of authorization. Indeed, the Authority is in essentially the same situation with respect to requests by subscribers to be placed on the "Do Not Call" Register, and it, like Talk.com, must rely upon the individuals to truthfully and correctly report their authorization. There is nothing to stop an individual from misrepresenting whom they are, but the Company cannot be held liable for those instances where the individual has chosen not to be truthful. The Company can only be required to use common sense and inquire.

2. Verification Scripts

Concerning the verification scripts, the TRA alleges that Talk.com's LOA failed to contain four (4) clear and unambiguous statements that confirm specific requirements set out in the Tennessee verification rules under Tenn. Comp. R. & Reg. 1220-4-2-.56(2)(c)(1). Specifically, the CSD alleges that the verification did not provide the company name of the independent third party verifier, the name of the individual verifying the change and the name of the carrier on whose behalf it is calling as required under Tenn. Comp. R. & Reg. 1220-4-2-.56(2)(c)(1)(i). In addition, the CSD claims that the verifications did not request whether the end user would like to verify his/her decision to switch service at the present time or wait until a later time. Tenn. Comp. R. & Reg. 1220-4-2-.56(2)(c)(1)(ii). Further, the CSD claims that the verification failed to explain what services (i.e. local, intraLATA, and/or interLATA) are about to be changed and the approximate time frame in which the change will occur, as required by Tenn. Comp. R. & Reg. 1220-4-2-.56(2)(c)(1)(vi). Finally, the CSD alleges that the verification fails to confirm that a request will or will not be submitted to the end user's LEC to change his or her preferred local exchange service provider, PIC, or LPIC. Tenn. Comp. R. & Reg. 1220-4-2-.56(2)(c)(1)(viii). As set forth below, the Company asserts that its solicitation and verification scripts are in compliance with the spirit Tennessee rules and any technical non-compliance with rules does not justify the imposition of a penalty in this instance.

a. The verification scripts used by Talk.com provide the Company with valid authorizations

It is important to note that the TRA does not provide model scripts or specific language to carriers for verification scripts. The elements set out under the rules do not mandate specific words or phrases that must be used by carriers in Tennessee. Instead, carriers are left without guidance from the TRA as what is specifically required.

First, at the time the verification process starts, the Talk.com representative makes it clear that another entity will be completing the verification. In fact, once the original representative transfers the call to verifications, they drop off the call, leaving the customer with the verification representative. At the beginning of the call the verifier states "Hi this is [name] with verifications," and then indicates to which carrier the customer is authorizing the switch in service. *See e.g. Exhibit A-22.* The Company believes that this identification is sufficient to satisfy the requirements of Tenn. Comp. R. & Reg. 1220-4-2-.56(c)(1)(i). It does not change the process if the verifier fails to identify the name of their employer. The mere technical non-compliance with Tenn. Comp. R. & Reg. 1220-4-2-.56(2)(c)(1)(i) does not negate the entire process. If it did, then any mistake, regardless of whether it is material or immaterial, would invalidate the verification process and assess slamming liabilities on carriers who have valid authorization from entities that are their customers.

Talk.com uses two (2) independent, unaffiliated TPV companies, ADC and Data Exchange, to obtain oral authorizations from subscribers Tennessee to submit preferred carrier change orders. These TPV companies operate in separate facilities from Talk.com and, consistent with the FCC's and the Authority's rules, are not compensated based upon the number of sales confirmed but rather, on the number of customer calls taken. The Company verifies each oral sale by connecting its customer to its TPV via a three-way conference call to verify the customer's desire to switch carriers; once the TPV gets on the line, the Company sales representative drops off. Both TPV companies are instructed by Talk.com to confirm the customer's desire to switch carriers by including appropriate verification data, such as the subscriber's social security number, date of birth, or mother's maiden name. Before an order is approved for submission to the LEC, a separate individual employed by the TPV entity listens to

the tape to affirm that the order is properly authorized. This duplicate verification process helps to ensure that the customer knowingly and unequivocally has selected the Company as their service provider.³² Once the verification company is satisfied that the customer's order is properly authorized, the order is sent to the Company for processing. Prior to processing, the Company reconfirms the customer's BNA against that of the customer service record and/or BNA currently on file with the ILEC, where available.

Second, the purpose of the verification is authorize the switch of telecommunications service providers. The Company either receives verification, or the sale is terminated. As required by the Tennessee rules, the Company confirms that the individual does want to switch their service to Talk.com. If the individual is unsure, the sale is terminated and the customer remains with their current provider. The Company's policy is not to place orders on "hold" but rather to either complete the sale, or terminate the process.

Third, the Company always indicates what service(s) will be changed both during the sale as well as during the verification process. However, as stated with the issue of LOAs above, because there are so many parts to switching and provisioning a customer's service that are completely out of the control of the Company, it is the Company's practice not to quote timeframes in which a change will occur. The Company hopes that the change in service will occur close to the date that the Company submits its request to the customer's current provider. However, all too often, problems and delays occur. The failure of the Company to include such a statement does not interfere with the fact that the customer authorized the switch in service.

Fourth, as part of verifying the authorization of the customer's change in telecommunications service providers, it is always the intent of the Company to submit the

³² This process also is designed to detect and prevent instances of transposed numbers or other errors in the verification process.

change request to the customer's current LEC. Otherwise, the Company would never have customers if it did not do so. Within the verification, the verifier indicates that the customer's order will be placed, the order being the request to change preferred carriers. If the order is not to be submitted, the transaction is cancelled. As a result, the Company's verification scripts are in substantial compliance with Tenn. Comp. R. & Reg. 1220-4-2-.56(2)(c)(1)(viii).

Please see *Exhibits A-16 through A-30* concerning the 15 individuals contained in this section of the Show Cause Order.

VI. SLAMMING ALLEGATIONS – MISCELLANEOUS

A. TALK.COM HAD VALID AUTHORIZATION AND DID NOT VIOLATE THE TENNESSEE CODE

The Company contends that the remaining allegations set forth under the "Miscellaneous Slamming Violations" in the Show Cause Order, like the complaints categorized as violations due to the use of promotional check or telephone solicitation, the Company had valid authorization to switch the requesting customer's local, local toll and long distance service to Talk.com. Of these four (4) miscellaneous complaints, one (1) involves the use of the Company's Carrier Identification Code ("CIC") (Complaint No. 31, Count 59), two (2) involve the scope of authorization given to the Company (Complaint No. 32; Count 60 (Keenan); Complaint No. 33, Count 62 (Foster)) and the last concerns the verification tape (Complaint No. 34, Count 63 (Wilson)). The CSD was to unable provide allegations of specific rule violations the Company supposedly committed against complainant Judy Beasley, Complaint No. 31; Count 59 and complainant Michael Foster, Complaint No. 33; Count 62. See *Exhibits A-31 and A-33* for additional information. The Company contends that despite the CSD's conclusory

allegations, its actions were in compliance with the Tennessee rules and therefore do not constitute slams in violation of the Tennessee Code.

The telephone number for which Ms. Beasley disputes authorization was her business line (BTN (901) 642-4077). Upon investigation, the Company has determined that it never submitted an order to switch BTN (901) 642-4077. The Company believes that the Mrs. Beasley used the Company's dial around access code to access the Company's network from the Beasley Business Line.

As the Company has previously explained to the CSD, the Company has an open network to which non-presubscribed BTNs can connect by dialing an access code (commonly known as a dial-around or 10-10XXX number). Customers who use the dial around code do not become presubscribed. Instead, they pay a per minute fee for calls they make. The Company bills them by requesting billing, telephone, address number from the Local Exchange Company, in this case Bell South, and then bills the customers directly for the use of their service. The individual is placed in the Company's billing system; however, the individual's telecommunications service provider is not changed. Furthermore, the bills indicate that the calling records for the Beasley Business Line came from the Talk.com and not The Other Phone Company d/b/a Access One and are based purely on usage, there are no monthly fees for local pre-subscribed service, as a result the bill looks like what it was: a bill for dial around usage. Therefore, the Company did not switch Mrs. Beasley's service in violation of Tenn. Code Ann. § 65-4-125(a).

Both complainant Janice Keenan, (Complaint No. 32; Count 60,) and complainant Michael Foster, (Complaint No. 33; Count 62), dispute the scope of the authorization given to the Company. See *Exhibit A-32 and A-33* for further information.

Complainant Keenan authorized the switch of her local toll and long distance service provider to Talk.com through both a promotional check and through a telephone solicitation completed by a third-party verification. *See Exhibit A-32; see also Smith Aff.* The Company could not have known, nor should it have reasonably known that Ms. Keenan, who successfully completed third party verification for her BTN (865) 376-0840 on July 26, 2000, and signed and cashed a promotional check in August 2000, did not intend to switch her service on the date the Company received notice of the complaint.

Complainant Foster authorized the switch of his local, local toll and long distance service provider to Talk.com, however, due to a delay in provisioning, his order was processed by BellSouth even after he submitted his request to cancel the pending order. *See Exhibit A-33; see also Smith Aff.* For additional discussion concerning scope of authorization, please see Section V *supra*.

Finally, complainant Lenore Wilson, (Complaint No. 34, Count 63), alleges the Company switched her telecommunications service provider without her authorization. At the time of the sign-up, the Company reasonably relied upon the letter from the third party verification company, ADC, a copy of which is attached hereto, authorizing the sale. In addition, the Company had apparent authorization for the number indicated on the verification from Shanan Wilson, who has the same last name as the authorized account holder and lives with the authorized account holder at the same address. Despite reasonable efforts, the Company has been unable to obtain a copy of the verification tape from ADC, the third-party verifier. The Company is currently contemplating pursuing alternative avenues for obtaining a copy of the verification tape.³³

³³ The Company is also considering deposing these individuals.

VII. ALLEGED “DO NOT CALL” REGISTER VIOLATIONS

The next general category of alleged violations relates to the contacting of individuals who have registered with the TRA’s Do Not Call (“DNC”) Register (referred to hereafter as the “Register”). In the Show Cause Order, the TRA alleges that in Counts 94 through 149, fifty-six (56) violations of the TRA’s DNC regulations occurred involving forty-four (44) residential telephone subscribers in Tennessee.

Under the Tennessee Code, no entity making solicitations by telephone may “knowingly make or cause to be made any telephone solicitation to any residential subscriber in this state who has given notice to the authority, in accordance with the regulations promulgated pursuant to this part, of such subscriber’s objection to receiving telephone solicitations.” *See* Tenn. Code Ann. § 65-4-404. Under the TRA’s regulations, it is a violation of the Tennessee Code “for a telephone solicitor to knowingly make or cause to be made any telephone solicitation to any telephone number that is listed on a Do Not Call Register that was in effect sixty days prior to the time of the telephone solicitation.” *See* Tenn. Comp. R. & Reg. 1220-4-11-.07(1). The TRA’s regulations further state that penalties for each violation of the DNC regulations may result in a maximum civil penalty of two-thousand dollars (\$2,000) for each violation. *See* Tenn. Comp. R. & Reg. 1220-4-11-.07(3).

As demonstrated below, Talk.com has not violated Section 65-4-404 of the Tennessee Code nor Section 1220-4-11 of the TRA’s regulations, and, as such, the corresponding DNC-based complaints should be dismissed. Notwithstanding this fact, if the TRA nevertheless finds Talk.com liable and assesses a forfeiture against the Company as a result of the DNC-based complaints, the amount proposed by the TRA in the Show Cause Order should be substantially

reduced, given the defenses set forth below and the good faith efforts of Talk.com regarding its DNC policies and its telephone solicitation and verification processes.

A. CERTAIN TELEPHONE NUMBERS CLAIMED TO HAVE BEEN CALLED BY TALK.COM WERE NOT LISTED ON AN EFFECTIVE DNC REGISTER AT THE TIME OF THE ALLEGED CALLS

It is not possible for certain of the alleged calls to the residential telephone numbers on the DNC-based complaints to be violations of the TRA's DNC regulations because, for some of the Complainants,³⁴ the requisite period of time prescribed by the TRA's regulations had not passed. In these cases, both of the following required conditions had not yet occurred: (1) the residential telephone subscribers possessing those telephone numbers must have been effectively enrolled on the Register; and (2) the Register must have been effective on the date that the Complainants alleged the violative calls.

Under the TRA's regulations there is a two-step process required prior to the effectiveness a DNC request by a residential telephone subscriber. First, the residential subscriber must effectively enroll on the Register. Second, the enrollment must be effective on the Register for sixty (60) days before a violation can be found.

The first step of the process is for a residential telephone subscriber to effectively enroll on the Register. Under the section of the TRA's regulations pertaining to "Consumer Registration," the regulation states that "[e]nrollment on to the Register will become effective

³⁴ Item Number 6 in Talk.com's First Requests for Production asked for "any and all documents relating to the sign-up method of each complainant . . . on the 'Do Not Call' Registry." The Response by the Consumer Services Division ("CSD") included Register sign-up-related computer screen print-outs for the Complainants in Counts 107 through 147. It is from this data that Talk.com identified the facts presented under this section VIII.A. The CSD did not include similar print-outs or any other information related to Talk.com's request under Item 6 for Counts 94 through 106. As such, the Company is unable to determine whether these additional thirteen (13) Counts avail themselves to the defense set forth herein. Talk.com reserves the right to raise this defense for these additional thirteen Counts if and when the CSD provides the requested data.

sixty days following the first day of the succeeding month of enrollment by the subscriber.” *See* Tenn. Comp. R. & Reg. 1220-4-11-.05(1)(a). The meaning of this is clear: “enrollment” on the Register is not effective immediately. Instead, it becomes effective no earlier than the first day of the third month following the month in which the request for enrollment is received by the TRA. In other words, if a subscriber made a request any in May 2000, such enrollment became an effective enrollment only after sixty (60) days from June 1 had passed—or July 31, 2000.³⁵

The second step is governed by TRA rule 1220-4-11-.07(1) which states that a call cannot be placed to “any telephone number that is listed in a Do Not Call Register that was in effect sixty (60) days prior to the time of the telephone solicitation.” *See* Tenn. Comp. R. & Reg. 1220-4-11-.07(1). Under this rule, after the subscriber has effectively enrolled on the Register, the Register must be “in effect” for an additional 60 days before a violation can occur. This rule provides telemarketing solicitors with a two-month period from the time the Register becomes effective to compare its internal DNC lists with the new Tennessee Register and to ensure that such listed residential telephone numbers are not called after the prescribed notice period. Under this rule, for example, a residential telephone number must have been first listed on the Register that was published in the beginning of June 2000 in order to create an actionable DNC violation for a call by a solicitor in August 2000.

While an important part of the TRA’s rules, this two-month lead time is not the only “waiting period” applicable to the telephone numbers placed on the Register. Rather, when combined with Step One, above, the result is a minimum four (4) month minimum period

³⁵ This two-month period provides the TRA with a maximum period of time by which it must process a registration request for the addition of a residential telephone number on to the Register. The two-month period under subsection -.05(1)(a) also provides the consumer with a tempered expectation regarding the speed with which the TRA will add the new number to the Registry, whereas the two-month period under subsection -.07(1) provides the solicitor with notice.

between a residential telephone subscriber's request for enrollment on the Register and protection afforded to the residential subscriber thereunder. Thus, an effective enrollment under subsection -.05(1)(a) is a condition precedent to an effective Register publication, and such enrollment must be effective before the sixty-day notice period under subsection -.07(1) can begin to run.

Accordingly, using the example above, whereby a telephone number must have been listed on the June 2000 Register to create an actionable DNC violation for a call by a solicitor in August 2000, the numbers posted for the first time on the June 2000 Register can have an effective enrollment date no earlier than the publication date for the June 2000 Register—and for that to occur, the registration request precedent to the effective enrollment must have occurred no later than March 31, 2000. In other words, for a residential telephone number to be protected by the DNC Register against solicitor contact in August 2000, the consumer must have registered no later than the last day of March 2000. In such case, a residential telephone subscriber registering on March 31, 2000, would have an effective enrollment under subsection -.05(1)(a) no earlier than June 1, 2000, and then, that residential telephone subscriber's number, according to subsection -.07(1), must be on the Register from the beginning of June 2000 until the end of July 2000 before a call to such residential telephone number would qualify as a violation of the DNC restriction.

Accordingly, the following Complaints, and their corresponding Counts in the Show Cause Order, fail for the reasons set forth above:

<u>Count</u>	<u>Complainant</u>	<u>Date of Enrollment Request³⁶</u>	<u>Date of Effective Enrollment³⁷</u>	<u>Earliest Date Register is Effective³⁸</u>	<u>Date of Alleged Call³⁹</u>
108	Michael Chance	5/26/2000	7/31/2000	9/30/2000	9/12/2000
128	Linda Corder	5/7/2000	7/31/2000	9/30/2000	9/12/2000
131	Remonia Headrick	5/16/2000	7/31/2000	9/30/2000	9/13/2000
132	Alton McConnell	6/12/2000	8/30/2000	10/31/2000	9/7/2000
134	Linda Bolt	5/1/2000	7/31/2000	9/30/2000	9/5/2000
140	Robert McCallister	5/1/2000	7/31/2000	9/30/2000	9/18/2000
144	Jackie Fortune	4/8/2000	6/30/2000	9/2/2000	8/3/2000
145	Bruce Luttrell	6/30/2000	8/30/2000	10/31/2000	9/7/2000

To further explain the methodology used in producing the chart above, please use Count 108 as an example. Complainant Chance requested enrollment on May 26, 2000. Under subsection -.05(1)(a) of the regulations, Complainant Chance's enrollment became effective sixty (60) days following the first day of the succeeding month of enrollment, which in this case was sixty days from June 1, 2000, *i.e.*, July 31, 2000. This is the first date on which Complainant Chance's telephone number is considered effective on the Tennessee Register. From that date, the sixty day notice period runs pursuant to subsection -.07(1).

³⁶ The data found in this column was provided by the CSD. *See supra* note 2. TRA printouts of these subscribers' DNC-related listings, which show the date of the enrollment request, are contained in the CSD's Response to Item 6 of Talk.com's first Request for Production.

³⁷ Calculations under this column are performed in accordance with the requirements of Tenn. Comp. R. & Reg. 1220-4-11-.05(1)(a) which states that "[e]nrollment on to the Register will become effective sixty (60) days following the first day of the succeeding month of enrollment by the subscriber."

³⁸ Calculations under this column are performed with the assumption that the monthly publication of the Register occurred on the first business day of month, and from this date, sixty (60) days are added in accordance with Tenn. Comp. R. & Reg. 1220-4-11-.07(1).

³⁹ In each case, the date of the alleged call pre-dates the earliest date that both the enrollment and the Register can be effective. As such, no violation has occurred.

The CSD is required to update the Register at the beginning of each month. *See* Tenn. Comp. R. & Reg. 1220-4-11-.03(4). Providing the CSD with the benefit of assuming that the required monthly updates are available to the public on the first business day of every month, Complainant Chance's effective enrollment can be posted for the first time on the August 1, 2000 Register. Under subsection -.07(1), this August 1, 2000 Register must be in effect for sixty additional days before a DNC violation may be found. Sixty days from August 1, 2000 is September 29, 2000. Accordingly, the first day on which the August 1, 2000 Register would be effective for names of newly effective enrollments is September 30, 2000.

Since Complainant Chance alleges that a call was made by Talk.com to his residential phone number on September 12, 2000—a date that precedes the September 30, 2000 effective date for the register with Complainant Chance's properly enrolled number—Complainant Chance fails to state an claim that qualifies as a violation of the DNC regulations. As such, the Complaint of Mr. Chance and the seven other Complainants listed above (and their corresponding Counts) must be dismissed or judged to have failed for failure to state a claim on which a violation can be based.

B. TALK.COM DID NOT MAKE OR DID NOT CAUSE TO BE MADE TWENTY-TWO OF THE CALLS THAT ALLEGEDLY VIOLATED THE DNC REGULATIONS

In the fifty six (56) Counts alleging violations of the TRA's DNC regulations, the Complainants claim that calls were made by Talk.com or persons making telephone solicitations on behalf of Talk.com. Notwithstanding these claims, Talk.com has no record of making or causing the telephone alleged calls in twenty two (22) of the Counts. Accordingly, the claims made in these twenty two (22) Counts must be dismissed or judged to have failed.

Talk.com is in the business of providing integrated telecommunications services, including local, long distance and dial-up Internet services, and, as part of its marketing and sales efforts, the Company solicits residential and business customers by telephone contact. *See Exhibit F*, Affidavit of Greg Luff, at p.2. Talk.com conducts its telemarketing efforts using Company employees and by contracting for the telemarketing services of independent firms. *See id.* at p.3. In the course of these efforts, it is the practice of Talk.com to keep DNC lists and to honor the call prohibitions regarding residential telephone subscribers placed on these lists. *See infra* section VIII.C.4. for a detailed accounting of the Company's internal DNC policies; *see also Exhibit H*, Affidavit of Brian Carroll. It is also the practice of the Company to keep records of the numbers called in these telemarketing efforts. *See* Carroll Affidavit at 2.

Talk.com maintains records of numbers called in the course of internal telemarketing efforts and records of numbers that the Company asks that its outside telemarketers contact by telephone. *See id.* For telemarketing calls made by the Company's employees, Talk.com maintains records of the numbers programmed into its autodialers. *See id.* For telemarketing calls made by contracted third-party firms, Talk.com maintains records of the lead lists provided to the third-party firms. Talk.com also maintains copies of disposition reports that contain lists of the numbers actually called by the third-party firms as well as the date and time of the call and an annotation regarding the success of the solicitation. *See id.*

Talk.com has searched its call records and sources for the time period in question under the complaints in the Show Cause Order. *See id.* at 4-5. As a result of this search, Talk.com can locate no record of contacting the residential numbers set forth in twenty two (22) of the fifty six (56) Counts. *See id.* Talk.com has no record of any internal calls to, or third-party telemarketing

firm contact made on behalf of Talk.com, made to the telephone numbers alleged (listed as “BTN” below), on or about the date complained, for the following:

<u>Count</u>	<u>Complainant</u>	<u>BTN</u>
94	Teresa Tharpe	615-459-2922
95	Frederick Snow	865-687-9119
96	Daniel Brown	615-763-2971
97	Laura Johnson	865-688-8626
98	Laura Johnson	865-688-8626
101	Thomas Fitzgerald	865-983-0298
102	Thomas Fitzgerald	865-983-0298
103	Brenda Rayman	865-584-8310
105	Jack Williams	865-691-1855
107	Matthew Smith	615-867-6644
108	Michael Chance	615-832-4269
114	Richard Hinze	865-458-7946
115	Richard Hinze	865-458-7946
119	Juanita Evans	865-982-0243
121	Linda Robinette	901-274-0200
128	Linda Corder	423-877-5668
131	Remonia Headrick	865-983-3584
134	Linda Bolt	865-577-4605
140	Robert McCallister	615-896-8445
144	Jackie Fortune	865-690-3348
146	David Thompson	423-639-3305
149	Emory Smith	615-833-3515

Because Talk.com does maintain or have access to call records of those numbers called during telemarketing efforts—in fact, Talk.com found records showing that it or its third-party telemarketing firms did contact, at some point, certain other telephone numbers set forth in the DNC-related complaints—and because Talk.com does not possess any records of calling or

causing calls to be made to the numbers identified above, during the relevant period, the Company denies that it “knowingly called or caused to be called” any of these numbers and, thus, cannot have violated the TRA’s DNC regulations with such calls.⁴⁰ Accordingly, the Counts alleging such violations should be dismissed or judged to have failed..

In light of its assertion that the Company did not knowingly called or caused to be called any of the above listed numbers, Talk.com asserts that these and the other DNC-related complaints might be based upon mistakes or misunderstandings on the part of the Complainants. As a threshold matter the call may have come from America Online (“AOL”) or an entity making calls on behalf of AOL—a company with whom Talk.com had a joint marketing relationship for the provision of bundled internet and telecommunications services. *See supra* section II.A. and *infra* section VIII.C.2 (regarding the joint marketing arrangement between Talk.com and AOL). It is possible that telemarketers not affiliated with Talk.com mentioned the name Talk.com in the course of selling the joint AOL-Talk.com service offering. Talk.com expects to learn more about this prospect through depositions taken later in this proceeding.

It is also highly possible that the Complainants have mistaken Talk.com for some other entity that uses the word “talk” in its name or service title. For example, in its list of “Approved Resellers as of 1/18/02,” which was provided by the CSD in its Responses to Talk.com’s First Request for Production (Response to Item 9), the reseller “EZ TALK COMMUNICATIONS, LLC” was listed. The name “EZ TALK” could be confusingly similar to Talk.com so as to cause a Complainant to make a mistake in reporting the violation of the DNC rules. Other examples of such confusing names include companies such as “CheapTALK.WS” and

⁴⁰ Even if an entity purporting to be Talk.com contacted these individuals, the absence of these numbers appearing on Talk.com’s lead lists or disposition reports demonstrates that Talk.com did not “knowingly” cause any such solicitation.

“JAXTALK.com” that both market a variety of long distance, calling card, and other telecommunications services.⁴¹ Service offerings that include the word “talk” could equally confuse subscribers. For instance plans labeled as “Talk For Less” or “Talk-No-Limits” are on the market and could have been offered to the Complainants in this proceeding.⁴² Although it is unknown whether these companies, or others like them with names similar to Talk.com, market to residential subscribers in Tennessee, it is possible. Accordingly, it is possible that any or all of the Complainants were mistaken in identifying Talk.com on their DNC Complaint.

The same possibilities for confusion or mistake exist where Access One is identified as the alleged calling party. On the TRA’s own records, there exists numerous certificated telecommunications carriers or approved resellers, that contain the words “access” or “one” in their names. They include the following:

- Access Integrated Networks, Inc.
- Access Point, Inc.
- Image Access, Inc.
- Net One International, Inc.
- One Point Communications, Georgia LLC
- OneSource Communications LLC
- OneStar Long Distance, Inc.
- Universal Access, Inc.

See The Consumer Services Division’s Responses and Objections to Talk.com’s First Request for Production, Response to Item 9. Talk.com expects to learn more about the prospect of Complainant mistakes or confusion through depositions taken of certain Complainants later in this proceeding.

⁴¹ For information regarding these confusingly similar companies, see www.cheaptalk.ws, www.jaxtalk.com, and www.ts99.com.

Additionally, where Talk.com is not even named as the entity that has allegedly violated the TRA's DNC rules, no cause of action can exist. In Count 126, Complainant Poczobut states that the telemarketing business against whom the complaint is filed was "PARK COMM." As such, this complaint does not even allege that Talk.com has committed a violation of the DNC rules. This is another example of how easily mistakes can be made regarding the identity of a calling party. In this case, the CSD mistakenly identified Talk.com as Park Comm in Count 126. For this reason, Count 126 and the Complaint filed by Mr. Poczobut must be dismissed.

C. WITH RESPECT TO CERTAIN COMPLAINTS, TALK.COM CLAIMS SPECIFIC DEFENSES UNDER THE DNC REGULATIONS

1. Calls to Business Telephone Numbers Cannot Violate the DNC Regulations

Count 144 of the Show Cause Order is based on an telephone call allegedly made by on behalf of Talk.com to Complainant Jackie Fortune at 865-690-3348. Telephone number (865) 690-3348 is listed in BellSouth's directory assistance records as "Jackie W. Ins. Res." *See Exhibit E*, Affidavit of Dwayne Morton. Further, this number is listed in both BellSouth's residential and business listings. *Id.* As such, this number is a "business" telephone number not eligible for inclusion on the DNC Register. *See* Tenn. Comp. R. & Reg. 1220-4-11-.05(c) (prohibiting business telephone subscribers from inclusion on the Register); Tenn. Comp. R. & Reg. 1220-4-11-.03(1) (permitting residential telephone numbers to be on the DNC Register). Even if the number is also used for residential purpose, Mr. Fortune clearly uses his number for business purposes. Such use constitutes "express invitation or permission" under the TRA's rules. *See* Tenn. Comp. R. & Reg. 1220-4-11-.01(19)(a) and (a)(1) ("the use of a residential

⁴²

For information regarding these confusingly similar plans, see www.tfltelecom.ca/phone.htm and www.talk-no-limits.com.

telephone line for the purposes of operating a business constitutes an express invitation or permission for the purposes of these rules.”).

Based on these findings, Talk.com asserts that the number listed in the complaint of Jackie Fortune is a residential telephone number used for the purposes of operating a business. Therefore, Talk.com also asserts that if it in fact had made the telephone call to Complainant Jackie Fortune as alleged in Count 144, then the Company could not have incurred a violation of the DNC regulations because, under regulation subsection -.01(19), the Company would have had permission to make such call because of Complainant’s business use of the telephone number. In such case, a prohibited “telephone solicitation” as defined by the TRA could not have occurred and, accordingly, the complaint, and corresponding Count 144, must be dismissed or judged to fail for the reason described above.

2. Calls to Existing Customers Cannot Violate the DNC Regulations

During the time period comprising the dates that the alleged DNC violations occurred, Talk.com was party to an exclusive joint marketing arrangement with America Online (“AOL”) under which the Company and AOL bundled telecommunications and Internet access services for sale to residential and small business customers. *See supra* section II.A. By virtue of the Talk.com-AOL joint marketing arrangement, Talk.com asserts that, during this time period of this arrangement, calls made to AOL subscribers do not violate the DNC rules.

The TRA’s DNC regulations define telephone solicitation to exclude “any voice communication to any residential telephone subscriber who is an existing customer.” *See* Tenn. Comp. R. & Reg. 1220-4-11-.01(19)(c). An “existing customer” is defined as “a residential telephone subscriber with whom the person or entity making a telephone solicitation has had a business relationship within the past twelve (12) months.” *See* Tenn. Comp. R. & Reg. 1220-4-

11-.01(11). Thus, "existing customers" include customers who have a current relationship with the person or entity making a solicitation or former customers who had such a relationship within the previous 12 months.

Talk.com's investigation to this point reveals that at least six (6) Complainants may be claimed as existing customers of Talk.com at the time of the alleged calls.⁴³ In discovery, CSD produced computer screen print-outs for complaints not in the DNC register. These printed screens showed e-mail addresses for some of the Complainants. The Complainants in Counts 108, 112, 122, 133, 147 and 148, listed below, identified their e-mail addresses as provided by AOL—i.e., they listed their e-mail addresses as ending with the domain "@aol.com." Accordingly, these Complainants were subscribers to AOL at the time they submitted requests to be on the DNC Register. Their information follows:

<u>Count</u>	<u>Complainant</u>	<u>BTN</u>
108	Michael Chance	615-832-4269
112	Thomas Davis	615-220-0075
122	Robert Ross	423-472-2910
133	Pamela Miller	615-672-8589
147	Chad Jerrell	615-865-7174
148	Chad Jerrell	615-865-7174

Based on these findings, Talk.com asserts that the telephone number listed in the complaints under Counts 108, 112, 122, 133, 147 and 148 are residential telephone numbers of

⁴³ See *supra* note 1. The CSD's Response to Talk.com's First Request for Production included Register sign-up-related computer screen print-outs for the Complainants in Counts 107 through 147. It is from this data that Talk.com identified the facts presented under the instant defense. The CSD did not include similar print-outs or any other information related to Talk.com's request for Counts 94 through 106. As such, the Company is unable to determine whether these additional thirteen (13) Counts avail themselves to the existing customer defense set forth herein. Data responsive to these thirteen Counts was again requested in a status conference between the parties on

subscribers who qualify as “existing customers” of AOL at the time of the alleged call and, as such, they are “existing customers” of Talk.com by virtue of the Company’s joint marketing agreement with AOL. Talk.com clarifies that, although the Companies are separate entities – Talk.com was not and is not “AOL” – this joint marketing agreement is relevant. Under the agreement, when selling the bundled internet-telecommunications product, there was a sufficient nexus between the business relationship of seller (AOL and Talk.com) and subscriber that both entities (AOL and Talk.com) are “persons or entities” with whom the customer had a “business relationship” for purposes of Tenn. Comp. R & Reg. 1220-4-11-.01(11). This relationship existed at the time of the alleged calls made in violation of the DNC rules.

Therefore, Talk.com asserts that if it in fact had made the telephone call to the Complainants in Counts 108, 112, 122, 133, 147 and 148 as alleged, then the Company could not have incurred a violation of the DNC regulations because, under regulation subsection -.01(19), the Company would have had permission to make such calls because of Complainants’ business relationship with Talk.com. In such cases, a prohibited “telephone solicitation” as defined by the TRA could not have occurred and, accordingly, the complaints, and corresponding Counts 108, 112, 122, 133, 147 and 148 must be dismissed or judged to fail for the reason described above.

3. Talk.com Requires the Use of Depositions and Additional Discovery to Obtain Information Relevant to Other Defenses

The TRA rules provide for several fact-based defenses to a DNC violation. In pursuit of these defenses, Talk.com has requested to take the depositions of each of the “Do Not Call” complainants. *See Brief of Talk.com in Support of the Talking of Depositions*, filed January 14,

February 7, 2002. Talk.com reserves the right to raise this defense for these additional thirteen Counts if and when the CSD provides the requested data.

2002. As explained below, such depositions, and, possibly, additional discovery, are necessary to obtain information relevant to the allegations.

First, Talk.com has a limited ability, short of deposition, to determine whether Complainants are using residential telephone lines for the purposes of operating a business. Talk.com understands that the CSD is requesting certain additional information from BellSouth in this regard. *See* Subpoena Duces Tecum, TRA Docket 01-00216, Jan. 16, 2002. To date, Talk.com has not been served with any response to the CSD's request, nor has it received any additional information from the CSD concerning this issue despite the fact that such information was to be delivered to the CSD no later than February 7, 2002. In addition, because the complainant's conduct is at issue, Talk.com needs to determine what, if any, business activities the individuals may be conducting from the numbers in question.

In 1992, approximately fifty percent (50%) of all U.S. businesses were home-based. *See* 1992 Characteristics of Business Owners, U.S. Census Bureau, www.census.gov/csd/cbo/view/sum.txt. Since 1992, given the explosive growth of internet and telecommunications connectivity and the business opportunities stemming from these technologies, the numbers of home-based business has no doubt grown. While 2000 Census reports regarding this characteristic of the modern economy has not yet been reported, the summary data now on file by the U.S. Census Bureau for year 2000 reveals a great number of Tennessee citizens working from their homes. For example, the Census Bureau reported that of the 2,578,418 Tennesseans reporting a commute to work, 74,777 reported that they "worked at home." *See* QT-03 Profile of Selected Economic Characteristics: 2000, Census 2000 Supplementary Survey Summary Tables, Tennessee, U.S. Census Bureau, <http://factfinder.census.gov/servlet/>. Also reported, of the 2,635,006 Tennesseans reporting their class of work (private, government, self-employed,

unpaid family worker), 171,388 reported that they were self-employed. Use of a residential phone for such home-based business activities would likely exclude the line from the DNC prohibitions under the TRA's rules. Clearly then, there is good cause to question the Complainant to determine whether any of them are operating a business from home and using their residential line for such business.

Second, Talk.com needs to explore the nature of prior business relationships the complainants may have had with entities such as AOL. Talk.com asserted above that the telephone number listed in certain complaints are residential telephone numbers of subscribers who qualify as "existing customers" of AOL at the time of the alleged call and, as such, that they are "existing customers" of Talk.com by virtue of the Company's joint marketing agreement with AOL. Although Talk.com was not and is not "AOL," under a joint marketing agreement for selling the bundled internet-telecommunications services, there was a sufficient nexus between the business relationship of seller (AOL and Talk.com) and subscriber to permit both entities to claim a customer relationship. This relationship existed at the time of the alleged calls made in violation of the DNC rules. Talk.com needs to determine the full extent to which the Complainants may have been customers of AOL at the time of the alleged calls, and intends to explore this matter by depositions and, if necessary, further discovery.

Third, depositions may reveal other forms of consent given by the subscribers. Talk.com is in the process of determining whether any of the DNC Complainants submitted an information request of the Company, whether by writing, internet or telephone. In conjunction with getting resolution of this issue through internal searches, Talk.com intends to question the Complainants regarding this matter.

4. Reasonable Practices and Procedures To Prevent Certain Telephone Solicitations, Implemented with Due Care, Shall Serve as a Defense to Violations of the DNC Regulations

The TRA's regulations state "it shall be a defense in any proceeding brought under this Chapter that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of this Chapter" *See* Tenn. Comp. R. & Reg. 1220-4-11-.07(4). Accordingly, Talk.com requests that the TRA take notice that the Company employs a strict, zero-tolerance policy toward any conduct that violates applicable law, including the TRA's "do not call" regulations, found in Section 1220-4-11.

Talk.com has implemented a number of policies to ensure the strict enforcement and swift policing action of violations of this applicable law. *See Exhibit H*, Affidavit of Brian Carroll, at Attachment A ("Talk America 'Do Not Call' Policy"). First, Talk.com does not conduct any telephone solicitations before 8 a.m. or after 9 p.m. *See id.*⁴⁴ Talk.com uses only live telephone solicitations, which clearly identify the Company and the individual solicitor who is initiating the call, Talk.com's telephone number as well as the Company's web address, and a street address at which the Company may be contacted. *See id.* The Company's solicitation processes do not interfere with or block caller ID services. *See id.* Talk.com has also instituted internal procedures for maintaining a list of individuals who do not wish to receive telephone solicitations. *See id.* Talk.com regularly adds this internal list to a master DNC list by Talk.com.

Talk.com subscribes to the Direct Marketing Association Telephone Preference Service File, which is a listing of more than four (4) million individuals nationwide who do not wish to receive marketing calls to be market to their homes. *See id.* Currently, in accordance with the corresponding state laws, Talk.com receives regular DNC list updates from Arkansas, Florida,

⁴⁴ On this basis, Talk.com denies that it knowingly made or caused to be made a solicitation after 9 p.m., as alleged in Count 115.

Georgia, Indiana, Kentucky, Missouri, New York and Tennessee.⁴⁵ As new states enact DNC laws and associated regulations, Talk.com will take all actions necessary to comply with those requirements. *See id.*

Talk.com acknowledges that it did not subscribe to the Tennessee Register as soon as it could have. However, immediately upon learning of its oversight and within a few months of the first publication of the Register, Talk.com had taken quick and decisive action to become a subscriber and has since updated its master DNC list with the numbers contained on the monthly Tennessee Register. As of October 25, 2000, Talk.com receives the latest DNC monthly Register from the TRA and then “scrubs” its master DNC list to ensure that the residential telephone numbers found on the Tennessee Register are not called by Talk.com. *See id.* This internal procedure is consistent with the FCC’s rules as well as Tennessee’s DNC regulations and Consumer Protection Act.

Talk.com strictly enforces its zero-tolerance policy. All employees of Talk.com and independent contractors (telemarketers and third-party verification (“TPV”) entities) have been notified of this zero-tolerance practice. *See Exhibit F*, Affidavit of Greg Luff, at 3. All independent contractors receive extensive training regarding Talk.com’s compliance procedures and are monitored to ensure compliance. *See id.* Independent contractors are separately notified of the zero-tolerance policy. On an ongoing basis, Talk.com’s regulatory department reviews its telemarketing and verification scripts to ensure full compliance with federal and state rules regarding the solicitation of customers and the unauthorized transfer of service. *See id.*

⁴⁵ *See Exhibit H*, Affidavit of Brian Carroll, at Attachment A (“Talk America ‘Do Not Call’ Policy”). Talk.com is in the process of registering for the DNC list in Louisiana, which enacted a DNC law that became effective January 1, 2002. In the course of tracking the DNC laws of other states, Talk.com has identified Texas as enacting a new law which also became effective on January 1, 2002, and will ensure that the numbers on

Talk.com affords the same scrutiny to all of its direct mail and on-line promotional campaigns. *See id.* Any employee or independent contractor who violates Talk.com's zero-tolerance policy is immediately terminated. *See id.* In October 2000, Talk.com terminated its relationship with its former telemarketing agent, Traffix (formerly known as Quintel Corporation) due to its belief that the agent engaged in unauthorized marketing promotions and practices.

VIII. CRAMMING

The final general category of alleged violations relates to the billing and collecting for telecommunication services not authorized by the customer in Tennessee. Known generally as a "cram," under the Tennessee Code, a telecommunication service provider may not bill and collect payment from a subscriber for telecommunications services unless the customer has expressly provided for authorization of the services to be billed and collected. Specifically, the Tennessee Code requires that:

[n]o telecommunications service provider, and no person acting on behalf of any telecommunications service provider, shall bill and collect from any subscriber to telecommunications services charges for services to which the provider or person acting on behalf of the provider *knows or reasonably should know* such subscriber has not subscribed or any amount in excess of that specified in the tariff or contract governing the charges for such services

Tenn. Code Ann §65-4-125(b) (*emphasis supplied*).

The Company's primary response to this allegation is set forth in the Company's Motion to Dismiss Counts 65-76 and 79-93 of the Show Cause Order, filed simultaneously with this Response. In this Motion, the Company will demonstrate that the alleged violations for twenty-seven (27) complaints cited in the Show Cause Order concern billing and collection practices for jurisdictionally-mixed bundles of services that Talk.com provides to its customers through its

the first Texas DNC list, available on April 1, 2002, will be swiftly and accurately incorporated into Talk.com's master DNC list. *See id.*

interstate tariff and Rates, Terms and Conditions (“RTC”) document. These billing practices, as they relate to jurisdictionally-mixed services, are not within the TRA’s jurisdiction.⁴⁶ If the Motion to Dismiss is denied, the Company respectfully requests the right to supplement this Response concerning the twenty-seven (27) alleged incidents of cramming.

With respect to the alleged cramming violations contained in Count 77 and Count 78 of the Show Cause Order, the Company hereby responds as follows.

The remaining two complaints, Counts 77 (Cecilia Peterson, File No. 01-0691) and 78 (Betty Monroe, File No. 01-0719), relate to former local and intraLATA customers of Access One. These two (2) customers appear to have selected local and intraLATA calling plans from Access One and thus do not fall under the same category as the other twenty-seven (27) cramming complainants, who were provided service by Talk.com in jurisdictionally mixed calling plans or bundled packages of service. Please see *Exhibit I-47* (Peterson complaint), and *Exhibit I-48* (Monroe complaint) for additional information concerning this complaint. Both of these complaints involving issues stemming from the Company continuing to bill the customer after they allege they have cancelled their service and switched back to BellSouth. In both instances, the Company did not know or have reason to know it was billing for services the subscriber had not subscribed, because it had never received notification from BellSouth that the customer had cancelled their service with Talk.com. In fact, until the Company receives notification from BellSouth confirming that a customer has switched service, the Company’s records will not

⁴⁶ The TRA acknowledges that it does not have jurisdiction over interstate services on its web site. See <http://www.state.tn.us/tra/consumer.htm> “As with any state, our jurisdiction only covers complaints within our state’s borders. Complaints concerning services provided between states or out of another country are best referred to the appropriate federal agency. An example of such a complaint would be telephone charges on calls made from Tennessee to New York. This kind of complaint should be referred to the FCC.”

reflect that a switch has occurred. Therefore, Talk.com had authority to continue to issue bills and attempt to collect for services during that time period.

IX. THE MAXIMUM POSSIBLE PENALTY PROPOSED IN THE SHOW CAUSE ORDER RELIES UPON ERRONEOUS CALCULATIONS AND IS OTHERWISE IMPROPERLY INFLATED

Talk.com has demonstrated above that it did not violate the applicable slamming, cramming or Do Not Call statutes or rules as alleged in the Show Cause Order. Accordingly, the Show Cause Order should be dismissed in its entirety. Even if the TRA were to conclude, erroneously (as demonstrated above) that Talk.com has nonetheless committed one or more violations, the maximum proposed penalty set forth in the Show Cause Order should be reduced substantially. As shown below, the CSD's calculations of the proposed fine are flawed in two fundamental respects, both of which erroneously inflate the number of days upon which a penalty is claimed to be appropriate. In addition, the amount of the penalty is incorrectly placed at the maximum permissible under the statute, without any consideration of Talk.com's good faith efforts to comply with the rules and other mitigation factors the Authority is required by statute to consider. As a result, even if a fine is determined to be justified, the amount of such penalty should be eliminated or reduced substantially.

A. THE CSD'S PROPOSED CALCULATIONS IMPROPERLY TREAT EACH INSTANCE OF ALLEGED SLAMMING OR IMPROPER BILLING AS MULTIPLE DAY VIOLATIONS

In calculating the maximum possible penalties for alleged slamming and cramming, the CSD relies upon § 65-4-125(f), for the proposition that "each day of any such violation" should be counted separately. In so doing, however, the CSD improperly characterizes the nature of the violation pursuant to § 65-4-125(a) and 125(b). As discussed below, the CSD's interpretation

unlawfully seeks to convert the single acts prohibited by the slamming and cramming statutes into multiple acts spanning hundreds of days in some instances.

1. Slamming Violations

In the Show Cause Order, the CSD asserts over three thousand days of violation for slamming. Show Cause Order at 110. The CSD explains that, “the days of violation are calculated from the date the service allegedly was switched without authorization until the date service was returned to the consumer’s preferred provider.” *Id.* This position misinterprets the slamming statute, unlawfully converting a single act into multiple “days” of violations.

Tenn. Code Ann. § 65-4-125(a) states:

[n]o telecommunication service provider, and no person acting on behalf of any telecommunications service provider, *shall designate or change* the provider of telecommunications service to a subscriber if the provider or person acting on behalf of the provider knows or reasonably should know that such provider or person does not have the authorization of such subscriber.

Tenn. Code Ann. § 65-4-125(a) (*emphasis supplied*). By its literal terms, the statute prohibits two specific acts by a telecommunications service provider. A provider may not “designate” the provider of telecommunications service without authorization. In addition, the provider may not “change” the provider of telecommunications service without authorization. These two acts – “designating” or “changing” a customer’s preferred provider – are one-time events. A telecommunications provider “designates” the service provider for a particular telephone line through the submission of a carrier change order to the subscriber’s local exchange carrier.⁴⁷ This action is either lawful or unlawful based upon the authorization provided to the carrier at the time it submits the order, as is discussed previously in this Response. Nevertheless, lawful or

⁴⁷ As an IXC and a UNE-P local carrier, Talk.com does not actually “change” a subscriber’s preferred telecommunications provider; it submits change requests that are implemented by the subscriber’s incumbent local exchange carrier. As a result, the portion of § 65-4-

unlawful, the act addressed by § 65-4-125(a) is completed upon the submission of the request to change the telecommunications service provider. This act does not continue for multiple days thereafter; that is, the company does not re-designate itself as the provider each day thereafter.⁴⁸ As a result, § 65-4-125(a) cannot be read as including multiple days of violations.

Section 65-4-125(a) is similar in this respect to Section 258 of the federal Telecommunications Act. Under Section 258, the action prohibited is the “submission” or “execution” of a change in the subscriber’s preferred telecommunications carrier if certain preconditions are not met.⁴⁹ These concepts are virtually identical to the concepts of the “designation” or “changing” of a telecommunications provider under § 65-4-125(a).⁵⁰ As the FCC has repeatedly recognized, a violation of its rules is a single violation, not multiple violations.⁵¹ Notably, the FCC, like the TRA, has authority to impose multiple penalties for “continuing violations.”⁵² The FCC has never asserted such authority in cases of slamming.

That violations of § 65-4-125(a) are single acts, not multiple continuing acts, is confirmed by the CSD’s treatment of the other violations Talk.com is alleged to have committed. For example, the CSD alleges that Talk.com violated Tenn. Comp. R. & Reg. 1220-4-2-.56(2)(a)(4) because its LOA, *inter alia*, failed to contain language that confirms the “carrier

125(a) that prohibits the “changing” of telecommunications carriers is not implicated in this proceeding.

⁴⁸ Instead, no additional designations or changes are made unless the subscriber asks for such a change at a later date.

⁴⁹ 47 U.S.C. § 258.

⁵⁰ The concepts of “designating” and “changing” a subscriber’s telecommunications carrier refer to essentially the same actions as the “submission” and “execution” of carrier change orders under the Section 258 of the federal Telecommunications Act. A submitting carrier such as Talk.com “designates” the carrier to be switched by “submitting” a carrier change request. An executing carrier such as BellSouth “changes” the carrier by “executing” the carrier change request.

⁵¹ See, e.g., *All American Telephone, Inc.*, Order of Forfeiture, 16 FCC Rcd 16601 (2001) (assessing each unlawful switch as a single violation).

designated in a letter of agency as a preferred local exchange, preferred interLATA or preferred intraLATA long-distance carrier is the carrier directly setting rates for the end user.” *See, e.g.,* Count 2. The CSD concludes that this allegedly improper “designation” constitutes one day of violation for purposes of § 65-4-125(f). Show Cause Order at 111. The CSD, wisely, does not contend that these defects in Talk.com’s promotional checks continue for additional days, nor does the CSD seek to impose multiple day penalties because the consequences of the violation allegedly continued for some additional time. Rather, when the action prohibited is specific – such as requiring that an LOA “contain” certain information or requiring that a carrier “designate” a preferred provider only upon authorization – a violation of the requirement constitutes only a single day of violation.

Indeed, for the CSD’s position to have any merit, § 65-4-125(a) would have to prohibit the provision of *unauthorized service*, not the “*designation*” of a telecommunications provider. But there is no language in the statute that prohibits the provision of unauthorized service. Instead, the statute clearly and unambiguously prohibits the action of designating a carrier that is unauthorized. That act is a single act; not multiple acts occurring over multiple days.

2. Cramming Violations

For similar reasons, alleged violations of § 65-4-125(b) are single day acts as well. Specifically, the Tennessee Code states that:

[n]o telecommunications service provider, and no person acting on behalf of any telecommunications service provider, *shall bill and collect from any subscriber* to telecommunications services charges for services to which the provider or person acting behalf of the provider knows or reasonably should know such subscriber has not subscribed or any amount in excess of that specified in the tariff or contract governing the charges for such services

Tenn. Code Ann §65-4-125(b) (*emphasis supplied*).

⁵² 47 U.S.C. § 503(b).

The action prohibited in this section also is specific: a service provider may not “bill and collect from any subscriber” charges that the provider knows not to be authorized. Thus, if this section is violated, it is violated by the act of “billing and collecting” services. Talk.com submits that such actions occur *once* each time a carrier sends an invoice to a subscriber (assuming all other requirements for a violation also are met). Thus, at most, each instance of unlawful cramming should be measured by the number of unlawful invoices that were billed and collected.

The CSD’s overreaching is particularly excessive in the cramming complaints. For twenty-nine alleged cramming Counts, the CSD calculates over *five thousand five hundred twelve (5,512)* “days” of violation. At \$1,000 per “day” of violation, the total proposed fine for “cramming” exceeds \$5.5 million, or nearly \$200,000 on average per customer crammed.⁵³ To further illustrate, in the case of Cecilia Peterson (Complaint No. 47; Count 77), Talk.com did not receive timely notice of cancellation from BellSouth and allegedly billed the subscriber from July 2000 through March 2001, a total of 9 allegedly unauthorized invoices. Ultimately, Talk.com determined that disconnection had occurred in August 2000, meaning that the customer owed \$69.80 (which was credited in full as a courtesy). Nevertheless, the CSD finds 202 “days” of violation, and proposes a fine of \$202,000 for this single incident.

B. THE CALCULATION OF THE NUMBER OF DAYS FOR SLAMMING VIOLATIONS SUBMITTED BY THE CSD IS INACCURATE.

1. Slamming Calculations

Even assuming, *arguendo*, that multiple days might be involved, the Company asserts that the methods used by the CSD to calculate the number of days of each violation is grossly

⁵³ The proposed fine from cramming accounts for 62% of the total proposed fine in this docket, even though cramming represents only 29 of 149 Counts alleged by the CSD.

inflated. The primary culprit is CSD's reliance upon the date the customers actually switched back to another carrier as the "end date" for such violations, thereby making Talk.com responsible for inactions and delays completely beyond its control.

Initially, CSD appears to have made a number of computation errors in its calculations. The CSD, in its investigation notes, relies heavily on the statements of a "BellSouth witness" to provide the CSD with BellSouth's version of the events that occurred. However, in several instances, the CSD either ignores BellSouth's information reaches a conclusion that contradicts BellSouth's information concerning the number of days of service in question. For example, in the complaint of Lenore Wilson, Ms. Wilson's local, local toll and long distance services were scheduled to be switch on **April 3, 2001** (and such was memorialized in a letter from BellSouth to Ms. Wilson), however, the CSD concluded that Ms. Wilson's local, local toll and long distance service were switched on **March 8, 2001**, and wrongfully assessed liability from that date, a difference of approximately 26 days (per service) for a liability of an additional 78 days.

The primary error in the CSD's calculations, however, is reliance upon the date of a switch back as the "end date" for any slamming violation. Specifically, the CSD states that, the days of violation are calculated from the date the service allegedly was switched "until the date service was returned to the consumer's preferred provider." Show Cause Order at 110. This calculation, however, unlawfully makes Talk.com responsible for actions, including the customer's own inaction, that are beyond the Company's control.

If a customer contacts Talk.com with a slamming complaint (or if Talk.com receives a filed complaint from the CSD), Talk.com informs the customer that the Company is unable to return them to the carrier of their choice. Talk.com clearly informs each customer that they must

contact their preferred carrier themselves, in order to make the switch.⁵⁴ This instruction is consistent with the instructions the Authority itself gives consumers who have been slammed. The Consumer Services Division, for example, posts on its website (under the link “Slamming and Cramming”) an instruction sheet entitled “What You Should Know About Telephone Fraud!” See <http://www.state.tn.us/tra/consumerfiles/slambrochure.htm>. In response to the question, “Steps to take if you’ve been slammed or crammed?” the CSD tells consumers, “inform *your local telephone company* that the changes made to your account were unauthorized and that you’d like to be reconnected to your previous service provider.” *Id.*

There are many different factors that may delay the consumer’s switch to another service provider after the consumer contacts Talk.com. For example, the Show Cause Order does not reveal what actions, if any, any of these consumers took to contact BellSouth or their preferred IXC, and, if so, when the consumer did so. The Show Cause Order also does not reveal what actions the customer’s preferred carrier took to reconnect service, in particular, when the carrier submitted an order to provision new service to the customer. Finally, the record does not reveal how promptly BellSouth acted to reconnect carriers. As a result, the period of time it allegedly took subscribers to reconnect to another carrier varies widely. Some, such as Edith Brown (Complaint No. 26; Count 51) involve only a single “day” of unauthorized service, while others, such as Carol O’Gorman (Complaint No. 25; Count 49) involve sixty “days” or more for some services.

Further, the record indicates that many consumers may have contacted their preferred carrier for either interexchange or intraLATA services, but failed to take any actions to move the

⁵⁴ Talk.com is not able to submit an order to BellSouth requesting that service be switched to another carrier. Talk.com (for understandable reasons, including the prevention of “reverse slamming” of deadbeat customers) is not able to submit an order requesting that a subscriber’s preferred carrier be switched to AT&T, for example.

other service to another carrier. *See, e.g.,* Carol O’Gorman (Complaint No. 25; Count 49) (alleging that the subscriber switched local toll services back on April 2, 2001, but did not switch long distance services until 6 weeks later, on May 23, 2001). In other instances, the customer’s local service is switched back significantly sooner than long distance or intraLATA services are. *See, e.g.,* Cindi Shields (Complaint No. 28; Count 53) (alleging 1 day of unauthorized local service, but 20 days each of unauthorized service for long distance and intraLATA). Sometimes, the situation is the exact opposite. *See, e.g.,* Kerry Beyer (Complaint No. 15; Count 29) (alleging 58 days of unauthorized local service but only 26 days of unauthorized local toll and long distance service).

Critically, none of these actions are within Talk.com’s control to address. As stated, Talk.com cannot submit an order on behalf of AT&T or any other carrier. Talk.com cannot make the subscriber contact his or her service provider promptly. Talk.com cannot control the speed with which the subscriber’s preferred carrier submits an order or the speed with which BellSouth implements it. Instead, Talk.com must wait for others to act, all the while providing free telephone service to the subscriber.⁵⁵

In order to avoid these problems, any number of days calculation for slamming must end on the date that Talk.com receives notice of the complaint. This is when Talk.com informs the subscriber to contact his or her carrier of choice, and this is also the last date on which Talk.com could possibly control whether service is provided to the customer.

2. Cramming Calculations

⁵⁵ If Talk.com were held responsible for these delays, its incentives would change dramatically. Rather than continuing to provide free service while waiting for the subscriber to act, Talk.com’s incentive would be to cut off the subscriber’s service as soon as possible, thereby avoiding tens of thousands of dollars or more in potential penalties for additional “days” of slamming. Such an outcome obviously would not serve the public interest, however.

Violations of Tenn. Code. Ann. § 65-4-125(b), should be calculated based on each instance of an improper invoice that was billed and collected. The Company believes that each billing cycle should constitute one (1) violation, assessed on the date the bill is sent and the Company. The Company does not continue to bill and collect each day of the billing cycle, rather, it is a monthly occurrence, and penalties should be assessed according to the actions.

3. Do Not Call Calculations

Violations of Tenn. Code Ann. § 65-4-404 are calculated based on single incidents and not on-going violations, therefore, no discussion is required as to the number of days calculated by the CSD concerning violations of the Tennessee Do Not Call Register.

C. The Calculation Of The Amount Of The Penalty is Inaccurate

Finally, the CSD calculates the proposed penalty using the statutory maximum fine of \$1,000 per day for slamming/cramming and \$2,000 per “Do Not Call” violation. In assessing penalties for slamming and cramming, however, § 65-4-125(f) requires the Authority to consider the carrier’s actions as a whole. Section 65-4-125(f) provides:

A telecommunications provider or person acting on the behalf of a telecommunications provider who violates any provision of this section, an regulation promulgated pursuant to this section or any order issued to enforce the provision of this section shall be subject to a civil penalty of not less than one hundred dollars (\$100) nor more than on thousand dollars (\$1000) for each day of any such violation. Such civil penalty shall be due and payable to the authority and shall be credited to the public utility account. *The authority shall consider mitigation factors as raised by the telecommunications service provider in assessing the amount of the civil penalty.*

Tenn. Code Ann. § 65-4-125(f) (*emphasis supplied*). Similarly, § 65-4-405(f) authorizes penalties for “Do Not Call” violations of “up to” \$2,000 per offense, clearly suggesting that the appropriate amount of a penalty should be determined on a case-by-case basis.

As shown in its defenses to each of the slamming and cramming counts, the assessment of the maximum fine is inappropriate for any such violation found. Talk.com's extensive efforts to ensure compliance with the FCC's and the Authority's authorization rules and procedures, along with evidence showing that it did not know nor reasonably should know that any of its actions were taken without customer authorization, are "mitigation factors" that merit a reduction in the amount of a fine. In each of the alleged slamming incidents, Talk.com either had authorization in fact or had apparent authorization which was not valid due to data errors, mistakes or other causes unknown to Talk.com. In short, even where an authorization may be found to be lacking, Talk.com acted reasonably and in good faith at all times. Accordingly, any proposed fine should be reduced substantially.

Similarly, in the case of the "Do Not Call" allegations, Talk.com has at all times sought to comply with the purpose and intent of the Tennessee "Do Not Call" rules. Talk.com takes commercially reasonable steps to comply with customers' "Do Not Call" wishes, and has extensive procedures in place to implement, monitor and control its telephone solicitations. In addition, Talk.com quickly moved to integrate the new Tennessee requirements into its own procedures as soon as it learned of the rules' requirements, and Talk.com has been in compliance with the rules since then. Accordingly, any liability for "Do Not Call" violations should be reduced substantially if not eliminated entirely.

X. CONCLUSION

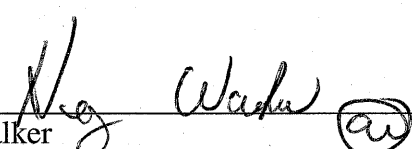
For the foregoing reasons, the Show Cause proceeding should be dismissed. Talk.com is a valuable provider of residential services to consumers in Tennessee, with a 12-year track record in providing innovative products and services to residential customers. Talk.com did not knowingly slam any Tennessee consumers, and any incorrect switches were the result of good

faith errors in securing authorization from the proper subscriber. With respect to the cramming allegations, the vast majority of these involve the billing and collection of interstate service packages beyond the Authority's jurisdiction, as explained in Talk.com's separate motion to dismiss. For the remaining two instances, any improper billing was caused by BellSouth's failure to provide timely notice to Talk.com that the customer had cancelled service, resulting in double billing to the subscriber. Finally, Talk.com did not knowingly call or cause to be called certain of the "Do Not Call" complainants and had valid justifications under the "Do Not Call" statutes for most of the remaining incidents. Accordingly, the Authority should find that Talk.com has not engaged in a pattern or practice of any rule violations, and promptly terminate this docket without assessing any penalties.

Respectfully submitted,

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